IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS DIVISION ONE

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The White Mountain Apache Tribe, a recognized tribe of American Indians, and Basin Building Materials Co. and E. H. Loveness Lumber Sales Co., Oregon corporations doing business in Arizona as "Pinetop Logging Company," petition the Court to issue a Writ of Certiorari to review the judgment and opinion of the Arizona Court of Appeals, Division I, entered in this proceeding on June 29, 1978.

OPINION BELOW

The opinion of the Arizona Court of Appeals, Div. I (App. at 24a-33a), is reported at 585 P.2d 891. The judgments of the Arizona Superior Court (App. at 19a-23a) are unreported, as is the order of the Arizona Supreme Court (App. at 37a) denying review.

JURISDICTION

The order and opinion of the Arizona Court of Appeals are dated June 29, 1978. A Motion for Rehearing was denied by that court on August 28, 1978. A Petition for Review by the Arizona Supreme Court denied on October 4, 1978. This Petition for Writ of Certiorari is filed within 90 days of October 4, 1978. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(3) (1970).

QUESTIONS PRESENTED FOR REVIEW

1. Whether 25 U.S.C. Secs. 196, 406 and 407 (1976) and 25 C.F.R. Secs. 141 and 142 (1978), under which Indian reservation timber is comprehensively regulated, preempt the states from taxing the gross receipts of a non-Indian agent of a tribal timber enterprise earned entirely from hauling tribal timber

for the Tribe on its reservation on tribal and BIA roads.

2. Whether such federal regulation of Indian reservation timber also preempts the states from taxing motor fuel consumption by a non-Indian agent of a tribal timber enterprise used to haul such timber for the Tribe on its reservation on tribal and BIA roads.

3. Whether the Arizona Enabling Act, 36 Stat. 557, 569, Sec. 20 (1910), in which Arizona disclaims absolute jurisdiction and control over tribal lands in favor of the Congress, prevents Arizona from regulating Indian reservation lands by conditioning the use of on-reservation tribal and BIA roads by non-Indian agents of a tribal timber enterprise upon the payment of state taxes for the privilege of using those roads and for consuming motor fuel to use those roads.

4. Whether 25 C.F.R. Sec. 1.4(a) (1978), which forbids the application of all state laws to the use or development of restricted real or personal property belonging to an Indian tribe and used or held under agreement with an Indian tribe, bars Arizona from taxing the gross receipts and motor fuel consumption of

non-Indian agents of a Tribe for hauling restricted tribal timber on tribal and BIA roads on reservation trust lands.

5. Whether state taxation of gross receipts of, and motor fuel consumption by, non-Indian agents of a tribal timber enterprise for hauling tribal timber on the reservation on tribal and BIA roads as a part of a tribal timber management, harvesting, manufacturing and marketing program infringes on tribal government in violation of the doctrine of Williams v. Lee, 358 U.S. 217 (1959).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved, which are set out verbatim in the Appendix, are U.S. Const. Art. I Sec. 8 and Art. IV Sec. 3; 25 U.S.C. Secs. 196, 406, 407 and 476 (1976); Arizona Enabling Act, 36 Stat. 557, 569 (1910); 25 C.F.R. Secs. 1.4, 141 and 142 (1978); Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona; Ariz. Rev. Stat. Secs. 28-1551, 28-1552, and 28-1556 (1976); and Ariz. Rev. Stat. Secs. 40-601, 40-641 (1974).

STATEMENT OF THE CASE

A. FACTS

Petitioner White Mountain Apache Tribe of Indians resides on the Fort Apache Indian Reservation in the White Mountains of eastern Arizona. Some 720,000 acres of the reservation is commercial forest. The Tribe supports its governmental activities almost exclusively from business enterprises conducted on its reservation, of which its timber operations are by far the most important.

The Tribe's business organization for the management, harvesting, milling and sale of tribal timber is the Fort Apache Timber Company (FATCO), which is created by the Tribal Council pursuant to the Tribal Constitution and is a part of the Tribe.[1/] FATCO conducts its operations entirely on the reservation.

Timber located on Indian reservation trust land is owned by the United States for the benefit of the

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1/ See generally, White Mountain Apache Indian Tribe v. Shelley, 197 Ariz. 4, 480 P.2d 654 (1971); Graves v. White Mountain Apache Tribe, 117 Ariz. 32, 570 P.2d 803 (App. 1977).

Tribe.[2/] Pursuant to statutory authority, the Bureau of Indian Affairs has entered into agreements to allow FATCO to harvest, mill, and sell reservation timber.

Although the entire timber enterprise is conducted by the Tribe itself under the close supervision of the BIA, portions of the operation have been contracted out. Independent loggers fell the trees, load them onto trucks, and carry them to the Tribe's sawmill. Among these independent loggers are petitioners Basin Building Materials Co. and E. H. Loveness Lumber Sales Co., Oregon corporations which have been logging for the Tribe since 1969 as "Pinetop Logging Company." All Pinetop's business activities in Arizona are confined to the Fort Apache Indian Reservation.

The Federal Government, through the Bureau of Indian Affairs, pervasively supervises and controls the timber activities of FATCO and of its contract loggers such as Pinetop. The BIA partly carries out its duty of regulating and planning the use of Indian forests to

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2/ United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); United States v. Klamath and Moadac Tribes, 304 U.S. 119 (1938); see generally, U.S. Dept. of Interior, Federal Indian Law 652-62 (1958).

the best advantage of the Indians through contracts between the BIA and the Tribe and through contracts between the Tribe and its loggers, which deal with many matters not covered in the Code of Federal Regulations. The terms of these contracts are dictated and enforced by the BIA. By this means the BIA determines, among other things, exactly who may haul for the Tribe and what prices may be charged for such services.

That duty is also carried out by intensive day-to-day supervision of all parts of the activities of FATCO and Pinetop. The BIA foresters supervise the marking, cutting and hauling of timber by FATCO and its contractors. They decide how much timber will be cut, which trees will be felled, where brush may be piled, where and when roads will be built for harvesting timber, which roads may be used and when, and how roads shall be maintained.

BIA officials together with Tribal employees grade the timber for manufacture into lumber or pulpwood chips. The Bureau regulates many facets of the hauling of logs, such as speed, permissible road conditions, safety, and the width, length, height, weight, and

binding of loads and what type of tractors may be used. The BIA even gives daily instructions to Pinetop's employees.

The affidavit of the head BIA forester with responsibility over the Fort Apache Indian Reservation states that the federal rules and regulations encompass "all aspects of forest utilization and management, including extensive rules and regulations governing in detail the planning, engineering, construction, maintenance and general regulation of all roads used by loggers."

There are three types of roads on the Fort Apache Indian Reservation. Some roads are constructed by the BIA and some by the Tribe itself. In a few places, State highways cross the reservation. Tribal loggers such as Pinetop are sometimes required to construct roads for harvesting timber, and they spend substantial amounts of money to build and maintain these tribal roads, which are not supported in any way by State funds. Thus, passable roads throughout the mountainous reservation result as an important "by-product" of the Tribe's timber enterprise.

Although the Tribe's constitution (App. at 55a-59a), which is authorized by 25 U.S.C. Sec. 476 (1976)

and approved by the Secretary of the Interior, allows it to tax both members and non-members doing business on the reservation subject to review by the Secretary, the Tribe has not levied any tax on loggers doing business with it either for the privilege of doing business on the reservation or for their consumption of motor fuel. Since such loggers are doing business by contract with the Tribe itself, any such tax would become a cost of doing business which would in turn be passed back to and borne by the Tribe.

It was originally anticipated that Pinetop would not be subject to Arizona's use fuel or motor carrier license taxes, and the contract price for Pinetop's services negotiated between it and the Tribe reflected that assumption. Since the State asserted these tax liabilities in 1971 the Tribe has been forced to agree to pay any such taxes which may be held valid in order to avoid losing the hauling services of Pinetop.

Contract motor carriers of property as defined in Ariz. Rev. Stat. Sec. 40-601 (1974) are taxed at 2.5% of their gross receipts under Ariz. Rev. Stat. Sec. 40-641 (1974) to support "the maintenance of Arizona

highways from parties who enter into business arrangements which look directly to the inordinate use of public highways to realize pecuniary benefits."[3/] This motor carrier license tax is required of persons who carry property for compensation by motor vehicle on "any public street, alley, road, highway or thoroughfare of any kind used by the public or open to the use of the public as a matter of right for the purpose of vehicular traffic." Ariz. Rev. Stat. Sec. 40-601(A)(11) (1974).

Ariz. Rev. Stat. Sec. 28-1552 (1976) levies a tax at the rate of eight cents per gallon upon fuel used in the propulsion of a motor vehicle on "any highway within the state," which includes "any way or place in the state of whatever nature open to the use of the public." Ariz. Rev. Stat. Sec. 28-1551(4) (1976). The tax is levied "for the purpose of partially compensating the state for the use of its highways." Ariz. Rev. Stat. Sec. 28-1552 (1976).

Pinetop uses substantial amounts of motor fuel in its logging and hauling operations on the Fort Apache

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3/ Campbell v. Commonwealth Plan Inc., 101 Ariz. 554, 557, 422 P.2d 118, 121 (1966).

Indian Reservation. Almost all of that fuel is used to propel its trucks and tractors along BIA and tribal roads for which the State of Arizona has no responsibility and which it spends no money to build or maintain. Pinetop's vehicles are required to pass across State highways at a few locations, and accurate records are maintained as to the small amount of fuel used on such State highways. Use fuel taxes and motor carrier license taxes have been paid for such mileage and are not involved in this lawsuit, which concerns taxes allocable to use off of State highways.

Between November 1971 and May 1976, Pinetop paid under protest to the State of Arizona $19,114.59 in use fuel taxes and $14,701.42 in motor carrier license taxes. Additional amounts continue to be paid under protest pending the outcome of this litigation.

B. PROCEDURAL HISTORY

Petitioner Pinetop Logging Co. began paying these taxes under protest in November, 1971, soon after the Respondent state authorities first claimed they were owing. Pinetop then brought this action for refund on December 8, 1971.

The suit was broadened by the First Amended Complaint filed in February, 1974,[4] which joined the Tribe as an additional plaintiff and sought also declaratory and injunctive relief against collection of the taxes.[5]

The claims to immunity from the state taxes under federal Indian law principles were raised in the Complaint and refined in the First Amended Complaint. (App. at 1a-18a) The Superior Court granted partial summary judgment for the respondent state officials on May 28, 1975, holding the state taxes not barred by the federal law principles invoked by the Tribe and Pinetop. (App. at 19a-20a) The case then went to trial on a purely

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4/ Through some inadvertence the First Amended Complaint was not file-stamped by the Clerk of the Superior Court. The Answers to the First Amended Complaint were filed February 26, 1974.

5/ The First Amended Complaint also joined as additional defendants the Arizona Corporation Commission and its members and the Governor and the Attorney General. It further sought relief against the new defendants prohibiting them from attempting to regulate the relationship between the Tribe and Pinetop as a "contract motor carrier of property" under the provisions of Ariz. Rev. Stat. Secs. 40-601 et seq. (1974). After the filing of Appellants' Opening Brief in the Arizona Court of Appeals, those defendants agreed they would not attempt to regulate Pinetop, so they were dismissed from this litigation. This case has since proceeded against only the present respondents, who are the state officials charged with enforcing the challenged taxes.

state-law question over the manner of calculating the motor carrier license taxes due, which was resolved against Pinetop by a final judgment entered September 7, 1976. (App. at 21a-23a)

The federal questions were squarely presented again in the Arizona Court of Appeals and were completely rejected there. That court did uphold Pinetop's state-law claim under stipulated facts to a partial refund (60%) of the motor carrier license taxes paid under protest and remanded for a computation of the partial refund due. (App. at 32a-33a) The Arizona Supreme Court on October 4, 1978 declined to grant review.[6/]

6/ Parallel litigation is also pending in the U.S. District Court for the District of Arizona, No. CIV-73-788 PTC WEC. When the State first claimed taxes from Pinetop in late 1971, it was informally agreed that future disputed taxes would be paid under protest as they accrued, which has been done since November, 1971. The State also threatened to collect some $30,000 said to be due for the periods between 1969 and November 1971. Since payment of this sum would have crippled Pinetop, the parties also informally agreed that collection of this $30,000 would be postponed until conclusion of this tax refund litigation.

In late 1973 the State determined to abandon this agreement and threatened to execute immediately on
(continued on next page)

ARGUMENT

I. COMPREHENSIVE FEDERAL REGULATION OF INDIAN TIMBER PREEMPTS THESE STATE GROSS RECEIPTS AND MOTOR FUEL TAXES ON AGENTS OF A TRIBAL TIMBER ENTERPRISE.

A. The federal preemption question has great importance to many Indian tribes possessing commercial timber resources and has not been resolved by this Court.

This is the first case to reach this Court on whether and to what extent comprehensive federal regulation

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(continued)
Pinetop's equipment to collect the $30,000. Since the Arizona courts have no power to enjoin collection of these taxes (Ariz. Rev. Stat. Sec. 40-648(A) (1974) and Sec. 28-1585(A) (1976)), the Tribe and Pinetop sued the same defendants in federal court on December 12, 1973 to enjoin collection of the taxes for the periods from 1969 to November, 1971. A temporary restraining order was granted on December 13, 1973. At a hearing on January 14, 1974, the District Court determined to stay the federal action on the condition that the state officials consent to a continuation of the temporary restraining order at least until conclusion of the state court action. The state officials accepted the District Court's offer, the restraining order was continued (later modified to a consent preliminary injunction on February 3, 1976), and no further action has been taken by the District Court.

The federal litigation concerns asserted tax liabilities for a different time period from those at issue in this case. Even if the same tax periods were involved, the state proceeding below was wholly independent of the federal action, and the questions presented by this petition were fully litigated in the Arizona Court of Appeals. The finality of the decision below for purposes of this petition is therefore unaffected by the federal action. Cf. NAACP v. Button, 371 U.S. 415, 427-28 (1963).

of Indian timber preempts state laws reaching the same subject matter.7/ Specifically, this Court has not ruled on whether such federal regulation preempts the states from draining tax revenues from on-reservation tribal timber enterprises because of the fortuity that an agent of such an enterprise is non-Indian.

The question of the preemptive effect of federal regulation of Indian timber is one of great importance throughout Indian Country. The Final Report of the American Indian Policy Review Commission (1977), a two-year Congressional study, summarizes the importance of timber resources to many Indian peoples:

> "Timber has the potential for being one of the most important Indian resources for development of reservation economies." Id. at 324

7/ One federal district court has ruled that federal Indian timber regulation preempts application of all state commercial law to timber contracts between tribes and lumber companies. Rather, such contracts are to be enforced according to federal common law principles of contract law. In re Humboldt Fir, Inc., 426 F.Supp. 292 (N.D. Cal. 1977). That is a far more expansive preemption of state law than the tax preemption claimed in this case, and it is plainly in conflict with the analysis and holding of the Arizona Court of Appeals.

> "The economic potential of Indian timber resources is very encouraging. Indeed, it is estimated that tribes possessed of medium to large stands of timber have the capacity to achieve economic self-sufficiency based on their timber resources alone for, as cannot be overemphasized, timber is a renewable resource. With proper management and with the development of related industry, it can supply an economic base for certain tribes for the indefinite future." Id. at 327.

The Final Report also shows the quantitative importance of timber resources to many tribes:

> "One-fourth of all Indian lands are forested, and 10 percent of all Indian lands are commercial forest lands. Timber contributes from 25 to 100 percent of tribal revenues for 57 reservations; more than 80 percent on 11 of these reservations. . . ." Id. at 324.

However, the Congressional commission also concludes that the potential benefits from timber have not been achieved, in large part because of the BIA's lack of success at comprehensive planning and management. Id. at 324-28.

If the historic cycle of Indian poverty and reliance upon federal welfare programs is ever to be broken, it can only be done by the development of reservation-based economies. Without on-reservation employment, Indian peoples must continue to choose between poverty or abandonment of their reservation homes and cultures.

The Congress has identified Indian timber development as an especially promising way to end that dilemma.

As tribes increase their development of timber, other states following the lead of Arizona will surely attempt to drain revenues off the reservation by taxing incidents of tribal timber enterprises. This Court should grant certiorari in this case to resolve for the benefit of the 57 tribes with commercial timber resources the important federal preemption question here presented. Indeed, until this Court speaks, uncertainty about the preemption question will itself hinder sound planning for Indian timber development.

B. The lower court erred in rejecting the Tribe's claim of federal preemption.

The leading case on implied federal preemption of state taxation of non-Indians doing business on Indian reservations is Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685 (1965).

Warren Trading Post held that Arizona could not impose its transaction privilege (gross receipts) tax on a non-Indian reservation trader selling to Indians. Congress had long regulated trade and commerce with the Indian tribes and had delegated to federal officials

the exclusive power to license traders. Acting under the authority of statutes enacted in 1876 and 1901, the Commissioner of Indian Affairs had promulgated detailed regulations (25 C.F.R. Secs. 251, 252) governing traders. The regulations required detailed business records, which may be inspected "to make sure that prices charged are fair and reasonable."

In light of this history of comprehensive regulation, this Court concluded that Congress intended "that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by acts of Congress or by valid regulations promulgated under those acts." 380 U.S. at 691

Arizona's gross receipts tax was held preempted by this comprehensive regulation, even though not expressly prohibited by it, because "this State tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the Tribes have proscribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." Id. at 691

The lower courts have applied the Warren Trading Post preemption doctrine in other areas as well.[8/]

In finding federal preemption of the state tax in Warren Trading Post, this Court focused on two factors: (1) the comprehensive scope of federal regulation of Indian traders and (2) a specific federal concern with the economics of the regulated activity (i.e., a concern that prices be fair and reasonable to Indians) which state taxation could touch upon. The management, harvesting and marketing of Indian reservation timber is likewise the subject of comprehensive federal regulation and of a specific federal concern with its economic impact upon Indian people.

Indian reservation timber is owned by the United States for the benefit of the Indian tribes and may not be harvested for sale even by the tribe itself without

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8/ Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F.Supp. 1339 (E.D. Wash. 1978) (three-judge court) (state tax on non-Indian purchases of cigarettes preempted by tribal tax); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658 & n. 2 (9th Cir. 1975) (all state regulation over Indian use or governance of reservation lands ousted); Confederated Tribes of the Colville Indian Reservation v. State of Washington, 412 F.Supp. 651, 656 (E.D. Wash. 1976) (state licensing of non-Indian fishing on the reservation is preempted in favor of tribe).

the explicit permission of the United States.[9/] A treatise on Indian law frequently cited by this Court states, "Congress has repeatedly enacted special legislation authorizing disposition of timber on various designated reservations, providing always that the proceeds of such disposition should accrue to the benefit of the tribe concerned." U.S. Dept. of Interior, Federal Indian Law 657 (1958).

Congress has also enacted various laws of general application relating to tribal timber. Among the earliest is an act of 1889, now codified as 25 U.S.C. Sec. 196 (1976), which authorizes the removal and sale of dead timber on Indian lands. In 1910 Congress allowed the sale of living as well as dead timber "under regulations to be proscribed by the Secretary of the Interior" on unalloted reservation lands, 25 U.S.C. Sec. 407 (1976), as well as on allotments with the consent of the Secretary. 25 U.S.C. Sec. 406 (1976). In 1964 Congress updated Sec. 407 to specifically

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9/ Pine River Logging & Improvement Co. v. United States, 186 U.S. 279 (1902); United States v. Cook, 86 U.S. (19 Wall.) 591 (1874); and authorities cited at 6, footnote 2, supra.

provide that Indian timber "may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use." The House Committee Report on this amendment evidences a federal concern with all aspects of Indian forest management and harvesting:

> "In enacting S. 1565 the Committee wishes it to be clearly understood modern means of reforestation practices as well as harvesting operations will be pursued in the implementation of the legislation." H. Rep. No. 1292, 88th Cong., 2nd Sess. (1964); 1964 U.S. Code Cong. and Adm. News 2162.

Some of the regulations issued pursuant to these statutes are published in the Code of Federal Regulations, 25 C.F.R. Secs. 141 and 142 (1978). The objectives of the regulations, stated in 25 C.F.R. Sec. 141.3 (1978), are notable for their comprehensiveness and their sole concern with maximizing the environmental, economic, employment, recreational and esthetic values of the forest for Indian peoples. Strikingly absent from the regulations are any provisions for the dedication of tribal forest resources to the building and maintaining of state highways off the reservation.

The BIA is also required to prepare comprehensive "management plans for the forest resource" for major Indian forests. 25 C.F.R. Sec. 141.4 (1978) The Bureau of Indian Affairs closely supervises all of the timber harvesting activities of FATCO and its logging contractors, such as Pinetop, as is summarized at pp. 5-8, supra.

The question under Warren Trading Post Co. then becomes whether there is room within this comprehensive scheme of federal regulation for also imposing the State's revenue raising purposes on Pinetop's activities -- and therefore on the tribal timber operation itself.

As has been stated, the State's use fuel and motor carrier license taxes are intended to raise revenues to support State highways. But the federal scheme of Indian timber management and harvesting is specifically concerned with the economics of Indian timber activity and with its financial consequences to the Indian beneficiaries. Like the gross receipts tax struck down in Warren Trading Post, Arizona's attempt to tax Indian timber activities will "disturb and disarrange the statutory plan Congress set up in order to protect the

Indians," in this case in their use and development of their timber resources.

The federal statutes and regulations dealing with Indian timber management are permeated with concern over the financial aspects of timber management and harvesting. The regulations explicitly state that the ultimate profit from timber activities should accrue to the Indians (25 C.F.R. Sec. 141.3(3)) and no mention is made of also meeting the financial needs of state governments for services they provide off the reservation.10/

The regulations also explicitly identify Indian employment as a major objective of the utilization of tribal timber (25 C.F.R. Sec. 141.3(3)), as have the earliest timber regulations dating from the Nineteenth Century. Cf. Pine River Logging & Improvement Co. v. United States, 186 U.S. 279 (1902). If Indian timber enterprises are saddled with additional costs (such as state taxes), their marginal profitability will be

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10/ This Court has also protected owners of timber on alloted lands from the financial demands of the federal government, holding federal income taxation on the sale of such timber to be a "charge or encumbrance" prohibited by the General Allotment Act of 1887. Squire v. Capoeman, 351 U.S. 1 (1956).

reduced and less timber activity will be economically feasible, resulting in fewer jobs for Indians. Congress has shown no intention of charging Indian timber enterprises with the building of off-reservation state highways at the expense of sacrificing Indian jobs, and such an additional purpose would necessarily frustrate some or all of the federal purposes enumerated in 25 C.F.R. Sec. 141.3.

Indeed, where there is a choice between maximizing economic benefits and pursuing other values in timber enterprises, the regulations themselves expressly state the other values to be sought: "the recreational or aesthetic value of the forest to the Indians" (25 C.F.R. Sec. 141.3(5)) and "the preservation and development of grazing, wildlife and other values of the forest to the extent that such action is in the best interest of the Indians." 25 C.F.R. Sec. 141.3(7) (emphasis supplied)

Warren Trading Post struck down a tax applied to a reservation trader because the additional economic burden imposed by such a tax "could" bear upon the prices of products sold to reservation Indians and

because the federal regulations showed a specific concern with the fairness and reasonableness of those prices. In this case, the United States has shown an even more pervasive concern with the economic viability of Indian timber enterprises and the economic consequences of such enterprises for Indian people. There is even less room here for the State to impose economic burdens on Indian timber enterprises unrelated to their stated federal objectives.

II. THE ARIZONA ENABLING ACT EXPRESSLY DEPRIVES ARIZONA OF REGULATORY JURISDICTION OVER INDIAN RESERVATION TRUST LANDS, WHICH INCLUDES THE POWER TO TAX THE USE OF TRIBALLY OWNED ROADS BY AGENTS OF THE TRIBE.

In the Arizona Enabling Act, 36 Stat. 557, 569 Sec. 20 (App. at 43a-44a), Congress expressly deprived the State of Arizona of regulatory jurisdiction over Indian reservation trust land itself. The Enabling Act contains two distinct provisions. First is a disclaimer of "all right and title" to Indian lands, and second is a disclaimer of "absolute jurisdiction and control" of Indian lands until the Indian titles thereto shall have been extinguished. The second deprives Arizona of regulatory jurisdiction over Indian land itself.

As applied in this case, the Arizona motor carrier license tax is a tax on agents of the Tribe for using Indian reservation roads (not owned, built, or maintained by the State) to haul tribal timber for the Tribe. The Arizona use fuel tax is a tax on the consumption of motor fuel consumed in the use of tribal roads.

The opinion of the lower court refuses to interpret the Arizona Enabling Act as depriving Arizona of power to regulate (i.e., tax) the use of reservation trust lands. Rather, the Arizona court, without even discussing the disclaimer of "absolute jurisdiction and control," notes that the Enabling Act also contains a disclaimer of "all right and title." It then holds that the only significance of the entire Enabling Act is as a disclaimer of property interest. 585 P.2d at 895-96, App. at 28a-29a

This holding is in plain conflict with the decisions of this Court. Nine western states[11/] admitted between

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11/ Arizona, Idaho, Montana, New Mexico, North Dakota, South Dakota, Utah, Washington and Wyoming. Related but quite dissimilar provisions are present in the Oklahoma and Alaska enabling acts.

1889 and 1912 have enabling act or constitutional disclaimers of "absolute jurisdiction or control" over Indian tribal lands. Such a disclaimer first appears in the North Dakota, South Dakota, Montana, and Washington enabling act, 25 Stat. 676 (1889), which provided that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ." 25 Stat. at 677. The legislative history of this act makes clear that Congress originally intended this language to render Indian reservation land entirely extraterritorial to the State. H. Rep. No. 1025, 50th Cong., 1st Sess., 8, 9 (1888) (to accompany HR 8466)

When this statutory language was first presented to the Supreme Court in Draper v. United States, 164 U.S. 240 (1896), the unequivocal legislative history was not brought to the Court's attention, and this Court declined to interpret the language as making Indian reservations completely extraterritorial to the State. However, the Court did hold such language to deprive states of regulatory authority over reservation trust land itself. After discussing the General Allotment Act of 1887 under which land allotments subject to

restrictions on alienation were made to individual Indians, the Court held that the enabling act disclaimer was intended "to prevent any implication of the power of the state to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment and severalty." Id. at 247

Over the years this Court has repeatedly held that such enabling act disclaimers deprive states not only of property interest in Indian lands but also of governmental authority at least in some respects.12/ Most recently this Court stated in considered dictum that the Arizona Enabling Act prevents the State from taxing the income of reservation Indians. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 175-76 (1973).

12/ Several cases cite such enabling act disclaimers in the context of state criminal jurisdiction on Indian reservations. Williams v. United States, 327 U.S. 711, 714 n. 10 (1946); United States v. Chavez, 290 U.S. 357, 360 (1933); Donnelly v. United States, 228 U.S. 243, 271-72 (1913); United States v. Sutton, 215 U.S. 291, 335-36 (1909). Compare, Organized Village of Kake v. Egan, 369 U.S. 60 (1962), which upheld state regulatory power over Indian property not on a reservation, as is explained in McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 175 n. 15 (1973).

The lower court refused to acknowledge any relationship between these taxes and the use of Indian land. 585 P.2d at 896, App. at 29a. We submit the nexus is present to anyone willing to see it. A tax on tribal agents for the privilege of using tribal roads on the tribe's own business is plainly an assertion of power over the use of that portion of the tribe's land which is roadway. In any event, the characterization of these state taxes for purposes of their impact on superior doctrines of federal law is itself a question of federal law. First Agricultural National Bank v. State Tax Commission, 392 U.S. 339, 346-47 (1968). Both taxes as applied here plainly regulate and burden the use of tribal roads in violation of the Arizona Enabling Act.13/

13/ The Arizona interpretation of its Enabling Act is in conflict with the interpretation given by other state courts to identical or similar enabling act provisions. Smith v. Temple, 82 S.D. 650, 652, 152 N.W.2d 547, 548 (1967); Peano v. Brennan, 20 S.D. 342, 346-47, 106 N.W. 409, 411 (1906); Makah Indian Tribe v. Callam County, 73 Wash. 2d 677, 440 P.2d 442 (1968); State ex rel. Adams v. Superior Court, 57 Wash. 2d 181, 188, 356 P.2d 985, 990 (1960). Several other state courts originally interpreted their enabling acts contrary to the Arizona courts' views but have more recently overruled their prior cases and come in line
(continued on following page)

III. REGULATIONS OF THE SECRETARY OF THE INTERIOR (25 C.F.R. SEC. 1.4) PRECLUDE THE STATES FROM TAXING AGENTS OF AN INDIAN TRIBE FOR USING TRIBAL ROADS TO HAUL TRIBAL PROPERTY FOR A TRIBE.

As applied here, the Arizona motor carrier license tax and use fuel tax are also prohibited by 25 C.F.R. Sec. 1.4 (1978). (App. at 44a-45a) Both taxes are "laws . . . governing, regulating or controlling the use or development of . . . real or personal property" since they impose conditions upon the use of tribal highways and of tribal timber. Specifically, they condition the use of tribal lands and they in substance condition the hauling of tribally-owned timber on tribal highways upon the payment of taxes to the State.

(continued)
with the Arizona interpretation. Compare Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957), with State ex rel. Tompton v. Denoyer, 6 N.D. 586, 72 N.W. 1014 (1897); compare State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), and State ex rel. McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972), with Crow Tribe of Indians v. Deernose, 158 Mont. 25, 487 P.2d 1133, 1135-36 (1971); compare Sangre de Cristo Development Corp. v. City of Santa Fe, 84 N.M. 343, 350, 503 P.2d 323, 330 (1972), and Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962), with Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 330, 361 P.2d 950, 953 (1961).

Notwithstanding the apparent literal application of the regulation to this case, the lower court -- without any textual support from the regulation itself -- construed it to prohibit only the application of state laws to Indian property. Thus, the section was held not to bar state regulation of a non-Indian's use of tribal real and personal property. 585 P.2d at 896-97, App. at 29a-30a

Despite the lower court's reading, the regulation itself plainly prohibits application of state laws "governing, regulating or controlling the use or development of any real or personal property . . . held or used under agreement with . . . any . . . Indian Tribe."

The other lower courts to consider the question have held 25 C.F.R. Sec. 1.4 to prohibit state regulation of the use of tribal property, even by a non-Indian.14/

14/ Sangre de Christo Development Corp. Inc. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 232, 331 (1972) (state subdivision regulation of land leased to and used by non-Indians is prohibited); Norvell v. Sangre de Christo Development Co. Inc., 372 F.Supp. 348 (D.N.M. 1974) rev'd on other grounds 519 F.2d 370 (10th Cir. 1975) (same; but also holding the regulation invalid); Parking Drilling Co. v. Metlakatla Indian Community, 451 F.Supp. 1127 (D. Alaska 1978) (Sec. 1.4 prevents application of state tort law of owners and possessors of land to a corporation, otherwise subject to state law, operating an airport leased from a tribe).

Furthermore, the Arizona court's holding that any de facto state regulation of use and development of tribal property is permissible under Section 1.4, provided the incidence of the regulation is upon a non-Indian, reduces that regulation to a nullity. If the regulation merely means that states may not regulate Indians on their reservations, it adds nothing to what would otherwise be the law. Cf. McClanahan v. Arizona State Tax Commission, supra.

The plain purpose of 25 C.F.R. Sec. 1.4 is to leave the control of reservation development of tribal trust property in the hands of the Tribe and the Federal Government, a purpose which must fail if states are allowed to tax and regulate the tribe's own use and development of its property through its non-Indian agents.

The decision of the Arizona Court of Appeals flies in the face of the plain meaning of 25 C.F.R. Sec. 1.4, defeats its purpose, and conflicts with the uniform lower court interpretation of the regulation. This Court should summarily reverse the lower court's interpretation of the regulation. In the alternative, plenary

review should be granted to allow fuller discussion of the true effect of this comprehensive federal regulation concerning authority to regulate economic development of Indian trust property.

IV. THE STATE TAXES IMPERMISSIBLY INFRINGE ON TRIBAL GOVERNMENT.

Even in the absence of federal treaties, statutes, or regulations on point, state jurisdiction over the affairs of non-Indians on reservations is still barred if the exercise of such authority would infringe on the self-government of reservation Indians. Williams v. Lee, 358 U.S. 218, 220 (1959). Even though the state may otherwise have legitimate interests in regulating the non-Indian's affairs, that state interest may be pursued only "up to the point where tribal self-government would be affected." McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 179 (1973). The rule, then, is that protection of tribal power of self-government is the preferred value when tribal and state interests clash.

The court below acknowledged the specific impairments of governmental freedom claimed here by the White Mountain Apache Tribe:

"Pinetop argues that these taxes cause interference in the following areas:

"1. With tribal judgments about who may use tribal roads.

"2. With control of its timber resources by conditioning non-Indian use upon payment of taxes to the state.

"3. With tribal choice of the means of managing and harvesting lumber.

"4. With the planning and scope of reservation economic development.

"5. With the tribe's building of passable roads.

"6. With the tribe's ability to tax the same activities." 585 P.2d at 898-99; App. at 31a-32a

These infringements frustrate specific powers of the Tribe confirmed in its constitution (App. at 55a-59a) as adopted pursuant to 25 U.S.C. Sec. 476 (1976) and approved by the Secretary of the Interior. However, the lower court found these infringements insufficient because, in its view, they would not bring the tribal timber enterprise "to its knees." The Arizona court would allow all manner of state interference with tribal governmental freedom up to the point where the tribe is destroyed. But the standard under McClanahan and Williams v. Lee is whether state regulation "infringes"

or "affects" tribal government, not whether it "brings it to its knees." The doctrine against infringement of tribal government is meant to protect Indian governments from illness as well as from funerals.

The Arizona court's disregard of the Williams v. Lee infringement doctrine is also in conflict with other decisions recognizing that in some circumstances state taxation of non-Indians can impermissibly infringe on tribal government.15/

The rule against infringement of tribal government has been increasingly litigated in recent years, and many of the lower courts have failed to give the doctrine its intended scope for the protection of Indian sovereignty.16/

15/ Confederated Tribes of the Colville Indian Reservation v. Washington, supra, at 19 n. 8; Eastern Navajo Industries, Inc. v. Bureau of Revenue, 84 N.M. 369, 552 P.2d 805 (N.M. App. 1976) (state gross receipts tax on state-chartered corporation, which is otherwise plainly subject to state law, infringes in tribal government since its revenues are derived from on-reservation business with an Indian tribe) (alternative holding).

16/ A Congressional member of the American Indian Policy Review Commission, which studied federal Indian law and policy for two years, concluded, "The lower court decisions applying this test are utterly irreconcilable." I Final Report of the American Indian Policy Review Commission 591 (1977) (Separate dissenting views of Cong. Lloyd Meeds, Vice-Chairman).

This decision by the Arizona Court of Appeals is uncommonly perverse in its misuse of the infringement doctrine. It presents an appropriate occasion for this Court to give the lower courts further guidance in the proper application of that doctrine.

CONCLUSION

The State of Arizona claims the right to tax the use of on-reservation tribally-owned roads by agents of the Tribe conducting the Tribe's own business. Not one penny of the revenues thus received by the State is used to build or maintain the roads the use of which is said to occasion these taxes.

This most recent of many attempts by Arizona to tax Indians and Indian tribes in substance runs afoul of specific statutes and regulations, of preemptive federal regulation of tribal timber management and harvesting, and of general federal principles limiting the powers of states within Indian country.

Historic and comprehensive federal regulation of Indian timber leaves no room for the state to impose additional financial burdens on tribal timber enterprises which could disburb and disarrange the statutory plan

Congress set up in order to protect Indians in their enjoyment of the benefits to be derived from tribal timber.

Congress specifically deprived the State of Arizona of power to regulate Indian trust lands, which include tribal roads, in Sec. 20 of the Arizona Enabling Act.

The Secretary of the Interior has further promulgated a regulation (25 C.F.R. Sec. 1.4) which specifically deprives states of authority to regulate the use and development on the reservation of tribal trust property, even by non-Indians. The Arizona taxes violate this express federal recognition that tribes and the Federal Government have exclusive authority, absent other express grants of jurisdiction to the states, over economic development of trust property.

Finally, even apart from the particular federal statutes and regulations, the state taxes as applied here infringe on tribal government in violation of the doctrine of Williams v. Lee and McClanahan v. Arizona State Tax Commission.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Neil Vincent Wake
Leo R. Beus
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Petitioners

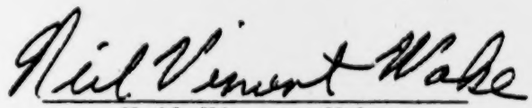
December 1978

CERTIFICATE OF SERVICE

I am one of the attorneys for the Petitioners and am a member of the bar of this Court. I hereby certify that I caused three copies of the foregoing Petition for Writ of Ceriorari to be hand delivered on December 27, 1978, to:

John A. LaSota, Jr.
The Attorney General
Donald O. Loeb
Special Assistant Attorney General
Paul S. Harter
Assistant Attorney General
State Capital
1700 West Washington
Phoenix, Arizona 85007
Attorneys for Respondents

All parties required to be served have been served.



Neil Vincent Wake

APPENDIX A

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; E. H. LOVENESS LUMBER SALES CO., an Oregon corporation dba PINETOP LOGGING COMPANY, qualified to do business in the State of Arizona; BASIN BUILDING MATERIALS COMPANY, an Oregon corporation dba PINETOP LOGGING COMPANY, qualified to do business in the State of Arizona,	)	No. C256110
Plaintiffs,	)	FIRST
vs.	)	AMENDED
JACK WILLIAMS, Governor of the State of Arizona; GARY K. NELSON, Attorney General for the State of Arizona; LEW DAVIS, Chairman of the Arizona Highway Commission; RUDY E. CAMPBELL, Vice Chairman of the Arizona Highway Commission; WALTER W. SURRETT, Member of the Arizona Highway Commission; LEN W. MATTICE, Member of the Arizona Highway Commission; JUSTIN HERMAN, Arizona State Highway Director; DAVID H. CAMPBELL, Superintendent of the Motor Vehicle Division, Arizona Highway Commission; ARIZONA	)	COMPLAINT
	)	[Filed February 1974]

CORPORATION COMMISSION; AL FARON, CHARLES GARLAND and ERNEST GARFIELD, Commissioners of the Arizona Commission,	)
Defendants.	)

For plaintiffs' cause of action, they state:

I

This action is brought pursuant to the Fourteenth Amendment of the Constitution of the United States, and the Supremacy Clause, Article VI of the Constitution of the United States, and federal statutes and regulations enacted and promulgated pursuant thereto; and the Commerce Clause, Article 1, Section 8 of the Constitution of the United States giving Congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes; and Arizona Revised Statutes 28-1585, payment of use fuel tax paid under protest according to the attached Schedule "A"; and A.R.S. 40-461 payment of the contract motor carrier tax paid under protest according to the attached Schedule "B".

II

Plaintiff, E. H. Loveness Lumber Sales Co. is a corporation incorporated under the laws of the State of Oregon, and is a corporation qualified to do business in the State of Arizona, with its principal place of business in the State of Oregon; Basin Building Materials Company is a corporation incorporated under the laws cf the State of Oregon,

and is a corporation qualified to do business in the State of Arizona, with its principal place of business in the State of Oregon, and is the successor in interest of E. H. Loveness Lumber Sales Co. Both companies are referred to hereinafter as Pinetop.

III

By Executive Order signed by President Grant, dated November 8, 1971 [sic], the Ft. Apache Indian Reservation was established by Act of Congress of June 7, 1897, the Ft. Apache and San Carlos Indian Reservations, which were established by Executive Order signed by President Grant on November 9, 1871, were divided and the White Mountain Indian Reservation was established separately.

IV

Defendant Gary K. Nelson, is the Attorney General of the State of Arizona. Defendant, Jack Williams, is the Governor of the State of Arizona and as Governor is responsible for the actual execution of Arizona's laws under the Arizona Constitution, Article V, Section 4. Defendant, Gary K. Nelson, as Attorney General for the State of Arizona, serves as the state's chief legal counsel pursuant to A.R.S. Sec. 41-192. All other defendants are state officials within the meaning of 28 U.S.C. 2281 and Spielson Motor Sales Co., Inc. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935). The Constitutional problems posed by the taxes referred to herein are also posed by parallel situations on other reservations in the State of Arizona.

V

The statutes involved in this Complaint are Arizona Revised Statutes, Title 40, Chapter 3, and Arizona Revised Statutes, Title 28, Chapter 9. These statutes of the State of Arizona embody matters of state-wide concern that are enforceable and have been enforced by the State of Arizona, its agencies and its subdivisions throughout the State.

VI

The White Mountain Apache Tribe operates on an annual Balance Budget of approximately $1,522,000.00, of which over 80% of said budget comes from profits on its forestry operations.

VII

The forestry operations of the tribe are run by the Ft. Apache Timber Company, a wholly owned business of the White Mountain Apache Indian Tribe. The timber company is responsible for the tribe's timber harvesting and lumber and wood products manufacturing operations on the reservation. All of the timber used at the timber company sawmill located on the reservation near Whiteriver, Arizona, comes from land and timber owned by the Tribe. The lumbering operation is the Tribe's principal industrial activity and provides a substantial portion of the revenues and employment for the tribe and its members.

VIII

The operation of a sawmill and related wood products manufacturing and remanufacturing consists of many activities, including the cutting, skidding,

loading, hauling, sawing and chipping of pulpwood and sawlog timber.

IX

There are two alternative means by which entities engaged in sawmill operations accomplish the harvesting and delivery of their timber to the sawmill. Some do their own "logging" while others, in order to save the very substantial investment necessary to a logging operation, contract that operation to an independent contractor.

X

The plaintiff, White Mountain Apache Tribe, has elected to contract its logging operations to the plaintiff Pinetop. Pinetop is compensated according to an agreed-upon scale for every thousand board feet of timber taken from the Tribe's timberlands and delivered to the sawmill near Whiteriver. The major portion of Pinetop's responsibility in fulfilling its contract with the Indians consists of cutting, skidding, trimming, loading and unloading the timber. The hauling is a necessary incidental activity to the operation of Pinetop. Approximately 60% of the timber which is transported is consumed in the manufacture of pulpwood or paper within the State of Arizona.

XI

Pinetop carries on no other activity in the State of Arizona outside of logging operation with the Ft. Apache Timber Co.

XII

The entire logging operation from the tree to the sawmill, occurs exclusively upon and with the White Mountain Apache Indian Reservation and constitutes commerce with an Indian Tribe.

XIII

There are four categories of roads in the Ft. Apache Indian Reservation which are used by the Plaintiffs in their logging operations: (1) tribal roads financed and maintained by the Indians exclusively; (2) federally funded (Bureau of Indian Affairs) roads serving recreational public needs; (3) state highways; and (4) logging roads built and maintained by loggers. In transporting timber from the woods to the sawmill, plaintiffs' vehicles travel substantially over tribal and BIA roads, although short portions of many of the trips are on state highways.

The only category of roads on the Fort Apache Indian Reservation which are built or maintained by the State of Arizona, is category (3), state highways. Categories (1), (2) and (4) are financed and maintained by sources other than monies from the State of Arizona. Tribal, BIA and logging roads are not public highways within the meaning of Arizona Revised Statutes Sec. 40-601.9, and thus any use fuel and license motor carrier taxes on these roads are inappropriate.

XIV

The State of Arizona, acting through the defendants, officials of the Arizona Highway Department, have assessed against Pinetop applicable to its logging operations on the Reservation, a use fuel tax and penalty pursuant to A.R.S. Sec.

28-1552, 28-1573, 28-1575 & 28-1576, and a motor carrier license tax and penalty pursuant to A.R.S. Sec. 40-641 and 40-646.

XV

The State of Arizona has also advised plaintiffs that pursuant to A.R.S. Sec. 40-607 and/or A.R.S. Sec. 40-609 a Certificate of Public Convenience and Necessity must be obtained from the Arizona Corporation Commission of the State of Arizona in order to continue its present logging operations. In order to obtain a Certificate of Public Convenience and Necessity, Pinetop must apply therefore to the Arizona Corporation Commission giving the Arizona Corporation Commission the following information:

1. The name and address of applicant, and the names and addresses of its officers, if any.

2. The principal place of business of applicant.

3. The public highways over which, and the fixed termini or regular route, if any, between or over which applicant desires to operate.

4. The kind of transportation, whether for property or passengers, together with the description and character of the vehicles which applicant proposes to use, including the seating capacity thereof, if for passenger transportation, or the tonnage thereof, if for property transportation.

5. The proposed time schedule, and a schedule of tariffs showing the fares or rates to be charged between the points to be served.

6. Such other information as the Commission prescribes. A hearing is then held, and the Commission can then, pursuant to its own terms, conditions, rules and regulations, issue a permit. The regulation thereafter by the Commission is extensive and would, if imposed on the plaintiffs, cause substantial interference and cost to plaintiffs. Said cost and interference would constitute a burden on commerce between and among plaintiff Pinetop and plaintiff Indians.

Failure to obtain said certificate or the failure to comply with any of the Commission's regulations constitutes a crime under Arizona law punishable by a substantial fine and imprisonment not to exceed one year. A.R.S. Sec. 40-660.

XVI

The use fuel tax is "an excise tax . . . imposed at the rate of seven cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within [the] state. . . ;" A.R.S. Sec. 28-1552, and the motor carrier license tax is "a license tax of two and one-half percent of the gross receipts from the carrier's operations within the state for the preceding calendar month, excluding receipts from property transported under a star route contract with the federal government." A.R.S. Sec. 40-641.

XVII

Neither of these taxes is apportioned according to usage over state highways located on the reservation. As to the use fuel taxes, the State of Arizona has attempted to tax all travel that occurs over BIA roads to whose construction,

maintenance and repair the state makes absolutely no contribution.

XVIII

The principal factors taken into account by Pinetop and the Tribe and the timber company in negotiating the per thousand price for the logging operation, is the costs to be incurred by Pinetop in carrying out that operation. While the tax is nominally imposed on Pinetop, it is effectively a tax on the Tribe and the timber company. These unapportioned taxes constitute a significant element of that cost.

XIX

Plaintiffs have voluntarily paid taxes on all fuel consumed on state highways. Plaintiffs dispute the right of the state to extract taxes for the use of logging, Indian and BIA roads where the State of Arizona exercises no authority, and whose construction, maintenance and repair costs, the State of Arizona contributes nothing.

XX

The aforementioned taxes are violative of the due process and equal protection clauses contained in the Fourteenth Amendment, the Commerce Clause, Article I, Section 8, Clause 3 and the Supremacy Clause, Article VI of the Federal Constitution and the due process of equal protection clauses of the State Constitution; the Arizona Enabling Act, Section 20, 36 Stat. 469; Arizona Constitution 20, Article XX Fourth.

XXI

The denial of equal protection results from the state's attempt to impose unapportioned taxes on the plaintiffs' logging operations occurring partly over roads maintained by the State of Arizona, but not on other operations that occur in part over state roads and part over non-state roads. There is no attempt to impose similar unapportioned taxes on carriers that operate partly in the State of Arizona and partly within some other state, and A.R.S. Sec. 40-641 expressly exempts "receipts from property transported under a star route contract of the federal government."

There is no legal basis for the taxation; the taxation is arbitrary and discriminatory, lacking any rational basis.

XXII

The unapportioned application of these taxes to the plaintiffs' operations constitutes a taking in contravention of the Fourteenth Amendment of the United States Constitution as due process is denied.

XXIII

Unapportioned application of these taxes to the plaintiffs' operations is a mere contravention of Congressional authority to regulate commerce with the Indians. Article I, Section 8, Clause 3 of the Constitution gives Congress the exclusive authority to "regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

The imposition of use fuel and motor carrier tax by the State of Arizona and the requirement to obtain a certificate of convenience and necessity impairs the right to regulate Indian commerce reserved to the Congress by the Constitution, as

evidenced by its conflict with Federal regulations.

XXIV

The Tribe originally adopted a Constitution and By-laws in 1938 and in conjunction with the Federal Government has concern of the overall management of the Reservation and all other organizations on the Reservation. Pursuant to 30 Stat. 64 (25 U.S.C. 476) as amended in 1968, Congress has the supreme right to regulate commerce of any tribe although the tribe dwells well within the confines of a state. Pursuant to Title 25 the Congress regulates the usage of all forests on Indian reservations. Extensive rules and regulations have been promulgated by the Bureau of Indian Affairs virtually encompassing all aspects of forest utilization and management. See for example 25 CFR Subchapter M and 36 CFR Part 200-201. Indian commerce is therefore closed to regulation by the State of Arizona because Congress has preempted the field with a comprehensive system of federal law which not only governs every phase of Indian Commerce but specifically rests the sole authority to regulate it to the Commissioner of Indian Affairs.

XXV

The stated objective of the Federal regulations are:

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield;

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic prin-

ciples to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water run-off and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the adviseability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

The taxes and regulations attempted to be imposed by the State of Arizona are in direct contravention of the stated objectives of Federal regulations.

XXVI

Only by express congressional grant may the State of Arizona diminish the right of Indians to govern themselves. The field of Indian commerce has not been the subject of such grant. Congress has permitted the states to assume concurrent, civil and criminal jurisdiction on Indian Reservations providing the states appropriately amend their Constitutions or Statutes. Act of August 15, 1953 c. 505 Sections 6, 7, 67 Stat. 590. Arizona has expressly disclaimed any such jurisdiction in its enabling Act and Constitution. Arizona Enabling Act, Section 20, 36 Stat. 569; Arizona Constitution, Article XX Fourth. Arizona having not accepted said jurisdiction, Arizona's claim to jurisdiction over commerce with the Indians must fail.

XXVII

The State of Arizona has in its Enabling Act, Section 20, 36 Stat. 569, and in Article XX of its Constitution, forever disclaimed any right or title to the unappropriated and ungranted public lands lying within the boundaries of lands owned or held by any Indian or Indian Tribes. The State has relinquished all jurisdiction over Indian Tribes and Indian commerce in its Constitution by disclaiming right or title to said lands ". . . which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Ariticle XX, Arizona Constitution.

XXVIII

This suit is of a civil nature and is brought for the purpose of obtaining a declaratory judgment, that the taxing and regulatory statutes described herein are unreasonable, arbitrary, capricious, discriminatory, unlawful, unconstitutional, void and unenforceable to the extent and insofar as said laws and any of the provisions thereof are interrupted [interpreted], applied, enforced or given effect so as to hinder, interfere, interfere with, impose, prevent, restrain or prohibit plaintiffs in their activities upon the Indian reservation; as well as for the purpose of obtaining an order restraining and enjoining the defendants and each of them, from assessing any further taxes or requiring Pinetop to obtain

a Certificate of Public Convenience and Necessity pursuant to the above named statutes.

XXIX

Arizona Revised Statutes Section 20-1585 and 40-649 both require that no injunction shall issue from any court which presumablyincludes Federal District Court to prevent or enjoin the collection of license or use fuel taxes imposed by the aforementioned statutes. This suit is brought for the purpose of obtaining a declaratory judgment (pursuant to Title 20 U.S.C. Sec. 2201), that such statutory requirements are unreasonable, arbitrary, capricious, discriminatory, unlawful, unconstitutional, void and unenforceable.

XXX

Plaintiffs alternatively plead that 60% of the logs transported by Pinetop are pulpwood logs which are consumed in the manufacture of pulpwood or paper within the State of Arizona. Arizona Revised Statutes Sec. 40-601.8 defines a private motor carrier (thus not subject to a license motor carrier tax) as a person who transports who is engaged in the "transporting of pulpwood logs which are consumed in the manufacture of pulp or paper within the State of Arizona by a person in the business of harvesting such pulpwood logs. . ." Defendants have refused and continued to refuse to reflect a reduction in their audit assessment for the pulpwood logs which are transported by Pinetop.

XXXI

Plaintiff Pinetop has exhausted its administrative remedies and has no

adequate remedy at law, and will be irreparably injured by the wrongful and unlawful acts of defendants, in threatening, ordering, attempting, or acting to enforce the provisions of the aforementioned statutes unless the defendants, and each of them, are restrained and enjoined by this Court from so threatening, ordering, attempting or acting.

WHEREFORE, plaintiffs pray:

1. That a declaratory judgment issue, restraining and enjoining defendants and each of them, and their deputies, agents, servants, employees and attorneys and all persons in active concert and participation with them from, in any manner, either directly or indirectly, threatening, ordering, attempting or acting to hinder, interfere with, impede, restrain, prohibit the relationship or otherwise regulate the relationship between Pinetop and the Tribe.

2. That a declaratory judgment issue declaring that the provisions of the assessment statutes be ruled unconstitutional as they apply to plaintiffs in the instant action and that all payments made by plaintiffs to the State of Arizona be refunded.

3. That a declaratory judgment issue declaring that the provisions of A.R.S. Sec. 28-1553, 28-1573, 28-1575 and 28-1576 not be used to impede, prevent, restrain or prohibit plaintiffs from doing business with each other.

4. That a declaratory judgment issue declaring that the provisions of A.R.S. Sec. 40-607, 40-608 and 40-660 not be used

to impede, prevent, restrain or prohibit plaintiffs from doing business with each other.

6. That a declaratory judgment issue declaring that the provisions of A.R.S. Secs. 20-1585 and 40-648 be ruled unconstitutional.

7. That a declaratory judgment issue declaring that the provisions of the aforementioned statutes not be used to assess, levy, lien or otherwise inhibit the relationship of Pinetop, Tribe or the Ft. Apache Timber Co.

8. For costs incurred and expended herein.

9. For such other and further relief as the Court may deem just and proper in the premises.

CAVNESS, DeROSE, SENNER & ROOD
By William Tifft
JENNINGS, STROUSS & SALMON
By Leo R. Beus

STATE OF ARIZONA)
) ss. AFFIDAVIT
County of Maricopa)

LELAND A. CARPENTER, being first duly sworn upon his oath deposes and says:

That he is the duly authorized and acting Secretary of Basin Building Materials and managing officer of Basin Building Materials dba Pinetop Logging in Arizona; that he has read the foregoing First Amended Complaint and knows the contents thereof; that the facts and

allegations therein contained are true of his own knowledge, except as to those matters said to be upon information and belief, which matters he believes to be true; and that he makes this affidavit on behalf of Basin Building Materials dba Pinetop Logging Co., being thereunto duly authorized.

DATED this 7th day of February, 1974.

Affiant

SUBSCRIBED AND SWORN to before me this 7th day of February, 1974.

s/ Susan T. Harmon
Notary Public

My Commission expires:
10-28-77

APPENDIX B

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; et al.	No. C 256110
Plaintiffs,	ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
vs.	
JACK WILLIAMS, Governor of the State of Arizona; et al.,	[Filed May 28, 1975]
Defendants.	

Cross motions for Partial Summary Judgment having been presented by both the Plaintiffs and Defendants and the Court having heard extended oral arguments thereon, and further having considered the various memoranda and authorities presented by counsel and being fully advised in the premises;

IT IS NOW ORDERED denying Plaintiff's Motion for Partial Summary Judgment;

IT IS FURTHER ORDERED that the Court hereby makes an expressed determination that there is no just reason for delay and therefore expressly directs the entry of an order granting Defendants' Motion for Partial Summary Judgment to the effect that the State of Arizona may validly impose its use fuel and motor carrier

license taxes against the Plaintiff corporation;

IT IS FURTHER ORDERED confirming August 21, 1975 at the hour of 9:30 o'clock A.M. in this Division as the time and place for trial to the Court sitting without a jury on all remaining issues.

DONE IN OPEN COURT this 23rd day of May, 1975.

/s/ Roger G. Strand
Judge of the Superior Court

APPENDIX C

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; et al.,	)	No. C256110
Plaintiffs,	)	JUDGMENT
vs.	)	[filed September 7, 1976]
JACK WILLIAMS, Governor of the State of Arizona; et al.,	)	
Defendants.	)	

This matter came on regularly for trial to the Court, sitting without a jury, on April 15, 1976, at the hour of 3:40 o'clock P.M., before the Honorable Rufus C. Coulter, Judge of the Superior Court of Arizona, Division 21, Maricopa County. Plaintiffs were represented by their attorneys LEO R. BEUS and NEIL VINCENT WAKE, and the defendants were represented by their attorney, DONALD O. LOEB, Assistant Attorney General.

By an Order entered May 28, 1975 the Honorable Roger G. Strand granted partial summary judgment in favor of defendants and against plaintiffs determining that the State's levy of its use fuel tax (A.R.S. § 28-1552) and its motor carrier license tax (A.R.S. § 40-641) against plaintiff PINETOP LOGGING COMPANY does

not violate the Constitutions of the United States or of Arizona and is not otherwise contrary to federal law.

The sole issue of fact or law presented to the Court for determination, as set forth in Paragraph 3 of the pretrial statement signed by all parties, is whether or not plaintiff corporations are entitled to the benefit of the pulpwood exemption to the motor carrier license tax contained in A.R.S. § 40-601.A.10. The parties submitted this issue to the Court on a stipulated statement of facts contained in the pretrial statement, an additional stipulation made in open court, one deposition and two exhibits.

Based upon the facts presented to the Court, the Court finds that plaintiff corporations are not entitled to the benefits of the pulpwood exemption.

Based upon the previous Order of Partial Summary Judgment entered on May 28, 1975, and upon the findings and conclusions of this Court,

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

1. That the plaintiffs are entitled to no refund of the $19,114.59 in use fuel taxes paid by them under protest from November 1971 to date or to be paid in the future.

2. That the plaintiffs are entitled to no refund of the $14,701.42 in motor carrier license taxes paid by them under protest from November 1971 to date or to be paid in the future;

3. That plaintiffs take nothing by way of relief against the defendants, and that the plaintiffs' First Amended Complaint is hereby dismissed with prejudice, each party to bear its own costs.

DONE IN OPEN COURT this 2 day of Sept., 1976.

/s/ Rufus C. Coulter
RUFUS C. COULTER
Judge of the Superior Court
Division 21

Approved as to form:

/s/ Neil Vincent Wake
Neil Vincent Wake

APPENDIX D

[585 P.2d 891]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; E. H. LOVENESS LUMBER SALES CO., an Oregon corporation dba PINETOP LOGGING COMPANY, qualified to do business in the State of Arizona; BASIN BUILDING MATERIALS COMPANY, an Oregon corporation dba PINETOP LOGGING COMPANY, qualified to do business in the State of Arizona, Appellants, v. ROBERT M. BRACKER, Chairman of the Arizona Department of Transportation Board; ARMAND ORTEGA, Vice Chairman of the Arizona Department of Transportation Board; EDWARD J. McCARTHY, RALPH A. WATKINS, JR., JOHN W. McLAUGHLIN, JOHN HOUSTON, WILLIAM A. ERDMANN, ROBERT M. BRACKER and ARMAND ORTEGA, members of the Board, Arizona Department of Transportation; and PHILIP THORNEYCROFT, Assistant Director, Arizona Department of Transportation, Motor Vehicle Division, Appellees.	1 CA-CIV 3226 (Consolidated with No. 1 CA-CIV 3619) DEPARTMENT B O P I N I O N

[585 P.2d 893]

JACOBSON, Judge

This appeal involves the right of the State of Arizona to collect taxes from a non-Indian private carrier on gross receipts derived from its travel over Indian tribal roadways and a diesel fuel "use tax" expended from travel over these same roadways.

Appellants, E. H. Loveness Lumber Sales and Basin Building Materials Company, both Oregon corporations, are authorized to do business in Arizona as Pinetop Logging Company (Pinetop). Pinetop and the White Mountain Apache Tribe[1] brought an action against various officials of the State of Arizona, including the governor, the attorney general, the Arizona Corporation Commission, the Arizona Highway Department and the Arizona Highway Commission, seeking a refund of use fuel taxes and motor carrier license taxes paid under protest by Pinetop and for declaratory relief prohibiting the various defendants from attempting to regulate the relationship between Pinetop and the tribe.[2]

1/ White Mountain Apache Tribe is a nominal party to this action. It has neither paid nor has the State of Arizona attempted to collect any taxes involved in this litigation from the White Mountain Apache Tribe.

2/ Although the pleadings before the trial court and appellants' briefs before this court attempt to raise the issue of state control over tribal relationships, at the time of oral argument it was admitted

The trial court granted the Arizona Highway Commission's motion for partial summary judgment on Pinetop's claim of immunity from the state's use fuel and motor carrier license taxes. The judgment on the partial summary judgment was made appealable and was timely appealed. The

[585 P.2d 894]

only issue remaining for trial was Pinetop's claim that under state law it was partially exempt from the motor carrier license tax due to the so-called "pulpwood exemption" to this tax. This issue proceeded to trial on a detailed stipulation of facts, depositional testimony and exhibits. The trial court entered judgment finding that Pinetop did not qualify for the "pulpwood exemption" and Pinetop likewise appeals from that judgment. By stipulation, these two appeals have been consolidated.

The undisputed facts show that Pinetop has contracted with the Fort Apache Timber Company (FATCO) to sell, load, and transport to the mill, timber growing on the Fort Apache Indian Reservation. FATCO is an economic organization created by the White Mountain Apache Tribe to oversee and control the harvesting and sale of lumber

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that the governor, attorney general and the Arizona Corporation Commission had been dropped from this litigation and the only issues deal with the motor fuel tax and motor carrier tax which the State of Arizona seeks to collect from Pinetop. Thus, the only active appellees are the Arizona Highway Department and the Arizona Highway Commission.

located on that reservation. The timber itself is owned by the United States for the benefit of the tribe and is under the supervision of the Department of the Interior, Bureau of Indian Affairs (B.I.A.), which has in turn, pursuant to statutory authority, entered into an agreement with FATCO for the harvesting, processing and selling of timber grown on the reservation. The White Mountain Apache Tribe has no treaty relationship with the United States, its reservation having been created by executive order.

Although B.I.A. has contracted with FATCO for certain lumbering operations, the B.I.A. directly selects the trees to be cut, dictates how many trees will be harvested, where logging roads will be built, and how they will be maintained. The B.I.A. also controls the type of equipment Pinetop can use to haul lumber, the speeds logging equipment may travel, and the width, length, height and weight of loads.

Pinetop has had a contractual relationship with the tribe (approved by B.I.A.) since 1969. Its entire logging operation is conducted on the Fort Apache Indian Reservation and, with the exception of passing over state highways at a few locations,[3/] Pinetop vehicles use only roads built and maintained by B.I.A., the tribe, or Pinetop itself.

3/ Pinetop has kept records concerning the amount of fuel used while traveling on state highways and does not seek a refund for fuel taxes or motor carrier license taxes attributable to state highway use.

In 1971, the Arizona Highway Department, pursuant to A.R.S. § 40-641 (motor carrier license tax) and A.R.S. § 28-1552 (use fuel taxes), sought to collect a motor carrier license tax of 2.5% of Pinetop's gross receipts from its carrier operations and the sum of eight cents per gallon for diesel fuel used by Pinetop in the propulsion of its motor vehicles. These taxes were paid under protest and suit was brought for their recovery.

A.R.S. § 40-601(A)(10) provides a "pulpwood exemption," that is, any private motor carrier in the business of harvesting pulpwood logs is exempt from the 2.5% common carrier license tax.

It appears that 60% of the logs actually harvested by Pinetop are ultimately used for pulpwood. All logs harvested and hauled by Pinetop are delivered to FATCO milling operations at Whiteriver, Arizona. At that point, the logs are segregated according to size for milling. If a particular log cannot be processed in the two mills located in Whiteriver, it is sent to a "chipper" which reduces the log to chips which are then sold to Southwest Forest Industries Paper Mill in Snowflake, Arizona. Pinetop does not harvest or haul pulpwood logs or chips directly to Southwest Forest Industries nor does it have any contractual relationship with Southwest Forest Industries.

By affidavit, it is alleged that since the tribe and Pinetop did not contemplate the tax liability of Pinetop for its logging operations, the tribe has agreed to pay the taxes involved in this litigation to Pinetop.

Pinetop contents its operations on the Fort Apache Indian Reservation are immune from state taxation on three theories; (1) that there exist statutory or constitu-

[585 P.2d 895]

tional prohibitions against such taxation; (2) that such taxation is prohibited by reason of federal preemption; and (3) that such taxation results in an infringement on Indian self-government.

In addition, Pinetop asserts that in any event, under state law it is entitled to a partial exemption on the motor license tax under the so-called "pulpwood exemption." These contentions will be discussed in the order presented.

STATUTORY PROHIBITIONS

Arizona has sought the collection of taxes in dispute under A.R.S. § 40-641 and A.R.S. § 28-1552. These statutes provide in part:

A.R.S. § 40-641:

> "A. In addition to all other taxes and fees:
>
> "1. Every common motor carrier of property and every contract motor carrier of property shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-half percent of the gross receipts from the carrier's operations within the state for the preceding calendar month . . .."

A.R.S. § 28-1552:

> "For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of eight cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within this state . . .."

Pinetop argues that the Arizona Enabling Act, 36 Stat. 557, 569, makes it immune from the imposition of the taxes involved. In this regard, it concedes that the Arizona courts' interpretation of that act would not prohibit the tax sought to be imposed.4/

Rather, Pinetop argues that since the Arizona Enabling Act was the result of a federal statute, federal interpretation must prevail. It then argues that McClanahan v. State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), can be construed as holding that the Arizona Enabling Act prohibits the taxation sought here.

4/ See Industrial Uranium Co. v. State Tax Comm'n., 95 Ariz. 130, 387 P.2d 1013 (1963) (upholding applicability of Arizona transaction privilege tax on non-Indian corporation engaged in mining operations on Navajo Reservation); Kahn v. Arizona State Tax Comm'n., 16 Ariz. App. 17, 490 P.2d 846 (1971), appeal dismissed for lack of federal question, 411 U.S. 941, 93 S.Ct. 1917, 36 L.Ed.2d 404 (1973) (holding that enabling act did not withdraw reservation lands from jurisdiction of Arizona); Pima County v. American Smelting & Refining Co., 21 Ariz. App. 406, 520 P.2d 319 (1974); Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976).

We do not determine here whether federal law has usurped the power of the courts of the State of Arizona to interpret its own organic law, for in our opinion, McClanahan does not have the force Pinetop attributes to it, and other federal cases interpreting other similar enabling acts come to a contrary conclusion.

The Arizona Enabling Act, 36 Stat. 557, 569 provides in part:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States . . . but nothing herein . . . shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian . . .."

In McClanahan, the United States Supreme Court held that this portion of the Enabling Act was an expression of Congress' assumption that the states lacked jurisdiction over Indians living on the reservation. McClanahan v. State Tax Commission, supra, 411 U.S. at 175, 93 S.Ct. at 1264, 36 L.Ed.2d at 137. As to that portion of the Enabling Act allowing the taxation of non-reservation Indians, McClanahan held:

> "It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the

> [585 P.2d 896]
>
> past construed language far more ambiguous than this as providing a tax exemption for Indians, [citations omitted], and we see no reason to give this language an especially crabbed or restrictive meaning." (emphasis added) 411 U.S. at 176, 93 S.Ct. at 1264, 36 L.Ed.2d at 138.

However, there is nothing in McClanahan, which would indicate that Arizona's Enabling Act intended to prohibit the taxation of non-Indians whose contractual business arrangements with a corporation on an Indian reservation formed by an executive order required them to perform services on that reservation. See Dept. of Revenue v. Hane Const. Co., 115 Ariz. 243, 564 P.2d 932 (App. 1977).

Moreover, it has long been held that enabling acts such as Arizona's did not afford protection for non-Indians from state taxation, even for activities conducted on Indian reservations. Thus, as early as 1896, in the case of Truscott v. Hurlbut Land & Cattle Co., 73 F. 60 (9th Cir. 1896), it was held that personal property belonging to non-Indians located on an Indian reservation was subject to state taxation in spite of Montana's Enabling Act. See also Utah & N. Ry. v. Fisher, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885) holding Idaho could properly tax a non-Indian corporation owned railroad

running through an Indian reservation.5/

However, we understand Pinetop's argument to be that the use fuel tax and the motor carrier license tax are levied on Pinetop's use of travelled road and as such falls within the Enabling Act language. We disagree with this characterization of the taxes involved. Neither tax is directly related to Indian lands, nor are they property taxes. The use fuel tax is an excise tax imposed upon the use of diesel fuel consumed in the propulsion of motor vehicles within the State of Arizona. A.R.S. § 28-1552. The motor carrier license tax is imposed on gross receipts and as such is in the nature of a tax on the privilege of doing business in this state. See Shaw v. State, 8 Ariz. App. 447, 447 P.2d 262 (1968). Neither tax has as its nexus, transactions between Pinetop and an Indian tribe, rather both taxes are based upon activities Pinetop has seen fit to conduct within the confines of the State of Arizona. In this sense, for Enabling Act purposes, it is as immaterial that these activities are conducted on an Indian reservation as it would be if they were conducted by Pinetop on a national

5/ For other cases upholding the right of a state to tax non-Indian transactions, although occurring on an Indian reservation, see Moe Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634 48 L.Ed.2d 96 (1976); Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); G. M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (1976); Chief Seattle Properties, Inc. v. Kitsap County, 86 Wash.2d 7, 541 P.2d 699 (1975).

forest. See Wilson v. Cook 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946); Dept. of Revenue v. Hane Const. Co., supra.

We therefore reject Pinetop's contention that Arizona's Enabling Act prohibits these taxes.

Pinetop next contends that 25 C.F.R. § 1.4 (1977) ousts the state from imposing the taxes sought here. This federal regulation provides in part:

> "(a) . . . none of the laws, ordinances, codes, resolutions, rules or other regulations of any State . . . limiting, zoning or otherwise governing, regulating, or controlling the use . . . of any . . . personal property . . . shall be applicable to any such property . . . belonging to any Indian or Indian tribe . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." (emphasis added)

The state suggests that this regulation is an unauthorized legislative action by the Secretary of the Interior and that as such is invalid. See Norvell v. Sangre de Cristo Development Co., 372 F. Supp. 348 (D.N.M. 1974), rev'd for lack of controversy, 519 F.2d, 370 (10th Cir. 1975). We need not make that determination here, however, for in our opinion the regulation, if valid, is not applicable to the facts in this case.

The regulation, by its own terms, seeks to limit the applicability of state laws to real

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or personal property "belonging to any Indian or Indian tribe." Again, Pinetop seeks to characterize the cases involved here as somehow related to tribal property. As previously pointed out, this characterization is incorrect. These taxes are levied upon the activity of Pinetop, a non-Indian. For the reasons we found Arizona's Enabling Act to be inapplicable, we likewise find 25 C.F.R. § 1.4 (1977) to be inapplicable to prohibit the levying of these taxes.

At this point, we deal with the bare allegation that the White Mountain Apache Tribe has agreed to reimburse Pinetop for its tax liability should these taxes be upheld. We first note that if the tribe has agreed to pay the taxes due here, being under no contractual or legal obligation to do so, it is a mere volunteer and as such cannot complain. See Maricopa County v. Arizona Citrus Land Co., 55 Ariz. 234, 100 P.2d, 587 (1940).

On the other hand, if the argument is that the economic burden of these taxes will ultimately fall on the tribe (by Pinetop raising the price of its services to the tribe to cover this expenditure), such an economic burden on a non-tax-paying entity will not invalidate the state tax. United States v. City of Detroit, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958); Murray v. State, 62 Wash.2d 619, 384 P.2d 337 (1963). As was stated in United States v. City of Detroit, supra:

> "At the same time it is well settled that the Government's constitutional immunity [United States immunity from state taxation] does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government." 355 U.S. at 469, 78 S.Ct. at 476, 2 L.Ed.2d at 427.

We therefore reject Pinetop's "ultimate burden" argument.

PREEMPTION BY FEDERAL GOVERNMENT

Pinetop next argues that the federal government has so preempted the field of harvesting tribal lumber, that state taxation in the area is prohibited. This contention is bottomed on the rationale of Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In Warren Trading Post, the United States Supreme Court held that the State of Arizona could not impose a transaction privilege tax on Indian traders, as the federal government had so regulated the Indian trading field including making "sure that prices charged are fair and reasonable" that a preemption of the area from state interference had occurred. In so holding, the Court noted:

> "This state tax on gross income would put financial burdens on appellant or the Indian with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against

prices deemed unfair or unreasonable by the Indian Commissioner." 380 U.S. at 691, 85 S.Ct. at 1246, 14 L.Ed.2d at 169.

Pinetop points to the extensive federal regulations dealing with the harvesting of tribal timber,[6] and claims a similar preemption here. In particular, Pinetop contends that the federal regulations seek to insure the financial integrity of the timber operation, the utilization of Indian labor, the protection of recreational or aesthetic values of the forest, and the preservation and development of grazing and wildlife. Pinetop then contends the taxation sought here will interfere with these federally mandated objectives.

First, we doubt that the combined annual use fuel and the motor carrier license tax of $9,000.00 assessed against Pinetop is going to seriously interfere with the tribe's objectives when its net revenues from timbering operations exceeds $1,500,000 per year. However, we do not place much reliance upon this lack of "interference." Rather, in

[585 P.2d 898]

our opinion, the federal regulations involved here do not result in a preemption of the field by the federal government.

In Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956) a three-prong test was enunciated to determine whether a federal

6/ See, e.g., 25 C.F.R. § 141.1, et seq. (1977).

regulation had preempted a particular field:

> "First, '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' 350 U.S. at 502, 76 S.Ct. at 480, 100 L.Ed. at 652, quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1946).
>
> * * *
>
> "Second, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' 350 U.S. at 504, 76 S.Ct. at 481, 100 L.Ed. at 653, quoting Rice v. Santa Fe Elevator Corp., supra, 331 U.S. at 230, 67 S.Ct. at 1152, 91 L.Ed. at 1459.
>
> * * *
>
> "Third, enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program." 350 U.S. at 505, 76 S.Ct. at 482, 100 L.Ed. at 654.

Applying these tests, we note that none of the regulations quoted to us seek to control the licensing of non-Indian haulers, the prices charged for that hauling (although Pinetop's contracts are subject to B.I.A. approval), the federal taxing of any operation of Pinetop, nor do

the federal regulations speak of who may conduct the hauling operations. Thus, unlike Warren Trading Post, there is no specific federal regulation seeking to regulate the "fair and reasonable" prices Pinetop may charge for its services.

As to the second criteria (dominant federal interest in the field) while the federal government may have a dominant interest in the harvesting of tribal lumber, there is nothing to indicate that this same interest was intended " . . . to preempt the field of regulating commercial activities between Indians and non-Indians." Palm Springs Spa, Inc. v. County of Riverside, 18 Cal.App.3d 372, 379, 95 Cal. Rptr. 879, 883 (1971). In particular, we find nothing to indicate that the federal government intended to dominate and exclusively control the right to tax the privilege of doing business in the state and the consumption of motor vehicle fuel within the state, an area traditionally left to the states. The federal regulations, even by inference, are silent on the subject.

As to the third criteria (conflict with federal administration) Pinetop raises the specter of state laws impinging the financial integrity of its timber operations, or "will force the tribe to alter its desired methods of operation in order to avoid these taxes."7/ As previously pointed out, the tribe has no liability for these taxes and thus this ghost is merely a kindred spirit to its "ultimate financial burden" argument, which we have previously rejected.

7/ Reply Brief for Appellant at 14.

Finally, Pinetop argues that a factual dispute exists as to the preemption question. We disagree. Assuming that the federal regulations have the effect contended by Pinetop, we find no federal preemption of Pinetop's operation with the tribe which would preclude the state taxes sought to be imposed here.

IMPINGEMENT OF TRIBAL RIGHT OF SELF-GOVERNMENT

Pinetop's attack under this heading is multi-faceted. Pinetop argues that these taxes cause interference in the following areas:

1. With tribal judgments about who may use tribal roads.

2. With control of its timber resources by conditioning non-Indian use upon payment of taxes to the state.

3. With tribal choice of the means of managing and harvesting lumber.

[585 P.2d 899]

4. With the planning and scope of reservation economic development.

5. With the tribe's building of passable roads.

6. With the tribe's ability to tax the same activities.

In our opinion, these "infringements" are more imaginary then real. In the final analysis, most of these arguments

are based on the hypothesis that the ultimate burden of Pinetop's having to pay approximately $9,000.00 annually in excise privilege taxes is going to be borne by the tribe. As previously suggested, the idea that payment of this sum is going to bring a net million and half dollar operation to its knees is pure sophistry. Moreover, Pinetop has failed to cite us to any case which holds that a state tax imposed upon a non-Indian doing business with a tribe results in an "infringement" of the tribe's right of self government.8/ The weight of authority is clearly to the contrary. See Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1977); Chief Seattle Properties, Inc. v. Kitsap County, 86 Wash.2d 7, 541 P.2d 699 (1975); Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971); Moe v. Confederated Salish and Kootenai Tribes, supra; Kahn v. Arizona State Tax Comm'n., supra; Industrial Uranium Co. v. State Tax Comm'n., supra.

8/ Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977), cited by Pinetop dealt with the attempted imposition of local zoning ordinances on Indian land. Likewise, Eastern Navajo Industries, Inc. v. Bureau of Revenue, 89 N.M. 369, 552 P.2d 805 (N.M. App. 1976), cert. denied, 430 U.S. 959, 97 S.Ct. 1610, ____ L.Ed.2d ____ (1977), also cited by Pinetop dealt with the purported taxation of a corporation which was an agency of the Navajo Tribe and in which the majority of stock was owned by Indians.

Also, Pinetop's Indian Commerce Clause argument based upon Article 1, § 8 of the United States Constitution, has been sufficiently answered in Moe v. Confederated Salish and Kootenai Tribes, supra.

Based on the foregoing authority, we reject Pinetop's infringement argument.

PULPWOOD EXEMPTION

Under the statutory scheme of classification of motor carriers, "private motor carriers" are exempt from the payment of the motor carrier license tax. A.R.S. § 40-601(A)(10) provides that carriers who are engaged in:

> "transporting of pulpwood logs which are consumed in the manufacture of pulp or paper within the state of Arizona by a person in the business of harvesting such pulpwood logs shall be deemed . . . to be a private motor carrier when so engaged. For purposes of this paragraph 'pulpwood logs' means logs which are used or intended for use as a raw material in the manufacture of pulp or paper."

Pinetop contends that since 60% of the logs it harvests ultimately end up as pulpwood, it is entitled to an exemption on 60% of its gross revenues derived from its logging operations. The state on the other hand argues that since Pinetop has no contractual relationship with Southwest Forest Industries (the paper manufacturer) and since it does not actually haul the pulpwood logs or chips to the Southwest Forest Industries Paper Mill, it cannot

claim the exemption. The state also argues that since the waste from logs actually destined for finished timber is likewise sent to Southwest Forest Industries, it would be virtually impossible to ascertain the extent of the exemption. Since Pinetop claims no exemption for such waste, we do not consider this aspect of the state's argument.

The proper interpretation of the so-called "pulpwood exemption" requires an historical analysis of the amendment creating that exemption. In 1969, the Arizona Supreme Court held in Boyes v. State, 105 Ariz. 34, 459 P.2d 86 (1969) that the transportation of pulpwood logs by one who also harvested those logs was not a private carrier and that the transportation was not merely an incident of the commercial enterprise of harvesting and thus was not entitled to an exemption from the tax imposed.

[585 P.2d 900]

The following year, the legislature amended the statute so as to specifically provide that the transportation of pulpwood logs was to be considered as "incidental" to the commercial enterprise of pulpwood harvesting, thus entitled to an exemption.

With this background in mind, we see nothing that requires that the harvester/transporter in order to be entitled to the exemption, complete the journey from the forest to the mill. Rather, the point of inquiry is whether the logs harvested and subsequently transported are "intended for use as a raw material in the manufacture of pulp or paper."

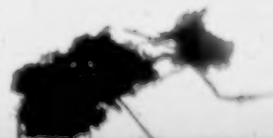
The stipulated facts here are that at the time of harvest, because of size, 60% of the trees cut by Pinetop are ultimately "intended for use" as pulpwood. While it is true that the actual segregation of the logs occurs at the FATCO lumber mill at Whiteriver, it would do violence to the parties' stipulated facts to suggest that at the time of harvesting, the parties had no knowledge as to what trees were destined for pulpwood usage.

The state argues that exemptions to taxes are to be strictly construed. However, the interpretation urged by the state would require us to add to the phrase "a pulpwood harvester transporting such pulpwood logs shall be deemed to be a private motor carrier when so engaged," the words "and the harvester completes the journey to the paper mill."

Under the stipulated facts herein, since the state does not argue that the apportionment of the exemption is improper, Pinetop is entitled to a 60% exemption on gross revenues derived from its transportation activities.

The judgments appealed from are affirmed in part and reversed in part and the matter remanded for a determination of the amount of refund due Pinetop as a result of the "pulpwood exemption."

EUBANK, P.J., and OGG, J., concur.



APPENDIX E

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order, et al., Appellants, vs. ROBERT M. BRACKER, Chairman of the Arizona Department of Transportation Board, et al., Appellees.	1 CA-CIV 3226 (Consolidated with No. 1 CA-CIV 3619) DEPARTMENT B MARICOPA County Superior Court No. C-256110 O R D E R [Filed June 29, 1978]

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the opinion be sent to each party appearing herein or the attorney for such party, to the Honorable Roger G. Strand and the Honorable Rufus C. Coulter, Jr., Judges.

DATED this 29th day of June, 1978.

/s/ William E. Eubank
WILLIAM E. EUBANK
PRESIDING JUDGE

APPENDIX F

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order, et al., Appellants, vs. ROBERT M. BRACKER, Chairman of the Arizona Department of Transportation Board, et al., Appellees.	1 CA-CIV 3226 (Consolidated with No. 1 CA-CIV 3619) DEPARTMENT B MARICOPA County Superior Court No. C-256110 ORDER [Filed August 28, 1978]

The motion for rehearing has been considered by the Court, Presiding Judge William E. Eubank and Judges Eino M. Jacobson and Jack L. Ogg participating.

IT IS ORDERED that the motion for rehearing is denied.

DATED this 28th day of August, 1978.

/s/ William E. Eubank
WILLIAM E. EUBANK
PRESIDING JUDGE

APPENDIX G

SUPREME COURT
STATE OF ARIZONA

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; et al., Appellants, vs. ROBERT M. BRACKER, Chairman of the Arizona Department of Transportation Board; et al., Appellees.	Supreme Court No. 13962-PR Court of Appeals No. 1 CA-CIV 3226 1 CA-CIV 3619 (Consolidated) Maricopa County No. C-256110 ORDER [Filed October 4, 1978]

The following action was taken by the Supreme Court of the State of Arizona on October 3, 1978 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 4th day of October, 1978.

CLIFFORD H. WARD, Clerk
By /s/ Mary Ann Hopkins
Deputy Clerk

APPENDIX H

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. United States Constitution Art. I § 8

The Congress shall have Power . . .
. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. United States Constitution Art. IV § 3

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

3. 25 U.S.C. § 196 (1976)

Sale or other disposition of dead timber

The President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing, or fallen, on such reservation or allotment for the

sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this section then in that case such authority shall not be granted.

4. 25 U.S.C. § 406 (1976)

Sale of timber on lands held under trust--Deductions for administrative expenses; standards guiding sales

(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his

heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.

(b) Upon the request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land.

(c) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary of the Interior is authorized to include such unrestricted interest in a sale of the trust or restricted Indian interests in timber sold pursuant to this section, and to perform any functions required of him by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deduction from such payments of sums in lieu of administrative expenses.

(d) For the purposes of this Act, the Secretary of the Interior is authorized to represent any Indian owner (1) who is a minor, (2) who has been adjudicated non compos mentis, (3) whose ownership interest in a decedent's estate has not been determined, or (4) who cannot be located by the Secretary after a reasonable and

diligent search and the giving of notice by publication.

(e) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the Secretary of the Interior without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects, disease, windthrow, or other natural catasrophes.

5. 25 U.S.C. § 407 (1976)

Sale of timber on unallotted lands

The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

6. 25 U.S.C. § 476 (1976)

Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution

and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

7. Arizona Enabling Act, 36 Stat. 557, 569

Sec. 20. . . .

. . .

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be

exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

8. 25 C.F.R. § 1.4 (1978)

State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may

consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

9. 25 C.F.R. §§ 141, 142 (1978)

SUBCHAPTER M—FORESTRY

PART 141—GENERAL FOREST REGULATIONS

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AUTHORITY: Secs. 7, 8, 36 Stat. 857, 25 U.S.C. 406, 407; and sec. 6, 48 Stat. 986, 25 U.S.C. 466; 47 Stat. 1417, 25 U.S.C. 413. § 141.23 issued under 5 U.S.C. 301, 25 U.S.C. 2, unless otherwise noted.

CROSS REFERENCES: For rights-of-way, see Part 161 of this chapter. For sale of forest products, Red Lake Indian Reservation, Minnesota, see Part 144 of this chapter. For sale of lumber and other forest products produced by Indian enterprises from other reservations, see Part 142 of this chapter. For wilderness and roadless areas, see Part 163 of this chapter. For law and order, see Part 11 of this chapter.

§ 141.1 Definitions.

As used in this part:

(a) "Secretary" means the Secretary of the Interior or his authorized representative.

(b) "Indian forest lands" means lands held in trust by the United States for Indian tribes or individual Indians or owned by such tribes or individuals subject to restrictions against alienation, that are considered to be chiefly valuable for the production of forest crops, or on which it is considered that a forest cover should be maintained in order to protect watershed or other values. A formal inspection and land classification action is not required before applying the provisions of this Part 141 to the management of any particular tract of land.

(c) "Stumpage value" means the value of uncut timber as it stands in the woods.

(d) "Stumpage rate" means the stumpage value per thousand board feet or other unit of measure.

[24 FR 7870, Sept. 30, 1959, as amended at 27 FR 12929, Dec. 29, 1962]

§ 141.2 Scope.

The regulations in this part are applicable to all Indian forest lands except as this part may be superseded by special legislation.

[24 FR 7870, Sept. 30, 1959]

§ 141.3 Objectives.

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield:

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic principles to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and a perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water runoff and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the advisability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

[29 FR 14740, Oct. 29, 1964]

§ 141.4 Sustained-yield management.

In accordance with the objectives set forth in § 141.3, the harvest of timber from Indian forest lands will not be authorized until there have been prescribed practical methods of cutting, based on sound silvicultural principles. Cutting schedules shall be directed toward the salvage of timber that is deteriorating as a result of fire damage, insect infestation, disease, over-maturity or other cause; and toward achieving an approximate balance between maximum net growth and harvest during each cutting cycle. For all Indian reservations of major importance from an industrial forestry standpoint, management plans for the forest resource shall be prepared by the Bureau of Indian Affairs, and revised as needed. The plans shall contain a statement of the manner in which the policies of the Bureau of Indian Affairs are to be applied on the forest, with a definite plan of silvicultural management and a program of action, including a cutting schedule, for a specified period in the future.

[24 FR 7870, Sept. 30, 1959]

§ 141.5 Cutting restrictions.

Clearcutting of large contiguous areas will be permitted only on lands that, when cleared, will be devoted to a more beneficial use than the growing of timber crops; but this restriction shall not prohibit clearcutting, by staggered settings or otherwise, when it is silviculturally good practice to harvest a particular stand of timber by such methods, or when it is not practicable to harvest such timber stand by methods other than clearcutting.

[24 FR 7870, Sept. 30, 1959]

§ 141.6 Indian operations.

Subject to approval by the Secretary, the following actions may be taken:

(a) Indian tribal logging or sawmill enterprises may be initiated and organized with the consent of the authorized tribal representatives.

(b) Such enterprises which do not operate under the provisions of Part 142 of this chapter shall enter into formal agreements with tribal representatives for the use of tribal timber, and with the individual Indian owners for allotted timber.

(c) Such enterprises may contract for the purchase of Indian-owned timber with the consent of the tribal representatives or the individual owners at stumpage rates established by the Secretary.

(d) Such enterprises may negotiate for the purchase of non-Indian owned timber.

(e) Performance bonds need not be required in connection with the use of timber by such enterprises.

(f) Payment for tribal timber cut by such enterprises may be authorized by methods other than those in § 141.15.

(g) Authorized officers of tribal enterprises, operating under approved agreements for the use of tribal or allotted timber pursuant to this section, may sell the forest products produced in accordance with generally accepted trade practices without compliance with section 3709 of the Revised Statutes.

[27 FR 12929, Dec. 29, 1962]

§ 141.7 Timber sales from unallotted and allotted lands.

(a) On reservations where the volume of timber available for cutting is in excess of that which is being developed by the Indians, open market sales of Indian timber will be authorized: *Provided*, That consent is given by the authorized representative of the tribe for tribal timber and by the owners of a majority Indian interest in trust or restricted timber on allotted lands. The consent of the Secretary is required in all cases.

(b) The Secretary may sell the timber on any Indian land held under a trust or other patent containing restrictions on alienations without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects, disease, windthrow, or other catastrophes.

(c) Unless otherwise authorized by the Secretary, sales from unallotted lands, allotted lands, or a combination of these two ownerships having a stumpage value exceeding $2,500 will not be approved until an examination of the timber to be sold has been made by a qualified forest officer and a report setting forth all pertinent information has been submitted to the officer authorized to approve the contract as provided in § 141.13. In all such sales of timber exceeding $2,500 in value, the timber shall be appraised and sold at not less than its appraised value.

[38 FR 24638, Sept. 10, 1973]

§ 141.8 Advertisement of sales.

Except as provided in §§ 141.6, 141.9, and 141.19, sales of timber shall be made only after advertising.

(a) The advertisement shall be approved by the officer who will approve the contract. Advertised sales shall be made under sealed bids, or at public auction, or under a combination thereof. The advertisement may limit sales of Indian timber to members of the tribe, or may grant to members of the tribe who submitted bids the right to meet the higher bid of a non-Indian. If the estimated stumpage value of the timber offered does not exceed $1,000, the advertisement may be made by posters and circular letters. If the estimated stumpage value exceeds $1,000, the advertisement shall also be made in at least one edition of a newspaper of general circulation in the locality where the timber is situated. If the estimated stumpage value does not exceed $10,000, the advertisement shall be for not less than 15 days; if the estimated stumpage value exceeds $10,000 but not $100,000, for not less than 30 days; and if the estimated stumpage value exceeds $100,000, for not less than 60 days.

(b) The approving officer may reduce the advertising period because of emergencies such as fire, beetle attack, blowdown, limitation of time, or when there would be no practical advantage in advertising for the prescribed periods.

(c) If no contract is executed after such advertisement, the approving officer may, within 1 year from the last day on which bids were to be received as defined in the advertisement, permit the sale of such timber in the open market upon the terms and conditions in the advertisement and at not less than the advertised value or the appraised value at the time of sale, whichever is greater.

[24 FR 7870, Sept. 30, 1959, as amended at 27 FR 12929, Dec. 29, 1962]

§ 141.9 Timber sales without advertisement.

Sales of timber may be made without advertisement with the consent of the authorized representative of the tribe for tribal timber or with the consent of the owners of a majority Indian interest in trust or restricted timber on allotted lands, and the approval of the Secretary: (a) To Indians or non-Indians when the timber is to be cut in conjunction with the granting of a right-of-way or authorized occupancy, or must be cut to protect the forest from injury, or if it is impractical to secure competition by formal advertising procedures, or when otherwise specifically authorized by statutes or regulations; or (b) To Indians who are members of the tribe for stumpage value not exceeding $10,000. Such contracts shall not be made for a longer term than 2 years. The stumpage rates in connection with such sales shall be established by the approving officer after due appraisal procedure. Timber contract forms executed under authority hereof shall be those stipulated for the sale of timber under § 141.12, and shall carry the bond requirement stipulated in § 141.14. No more than one such sale without advertisement may be made to any person or operating group of persons in any 1 calendar year. In the case of each negotiated transaction the approving officer shall establish a documented record of the transaction, including a written determination and finding that the transaction is of a type or class allowing the negotiation procedures or warranting departure from the procedures provided in § 141.8; the extent of solicitation and competition, or a statement of the facts upon which a finding of impracticability of securing competition is based; and a statement of the factors on which the award is based, including a determination as to the reasonability of the price accepted.

[38 FR 24638, Sept. 10, 1973]

§ 141.10 Deposit with bid.

(a) A deposit shall be made with each proposal for the purchase of either allotted or unallotted Indian timber. Such deposits shall be at least 20 percent if the appraised stumpage value is less than $10,000; at least 10 percent if the appraised stumpage value is between $10,000 and $100,000, but in any event not less than $2,000; at least 5 percent if the appraised stumpage value is between $100,000 and $250,000, but in any event not less than $10,000; and at least 3 percent if the appraised stumpage value exceeds $250,000, but in any event not less than $12,500.

(b) Deposits shall be in the form of either a certified check, cashier's check, bank draft, or postal money order, drawn payable to the order of the Bureau of Indian Affairs, or in cash.

(c) The deposit of the apparent high bidder, and of others who submit written requests to have their bids considered for acceptance, will be retained pending acceptance or rejection of the bids. All other deposits will be returned promptly following the opening and posting of bids.

(d) The deposit of the successful bidder will be retained as liquidated damages if the bidder does not execute the contract, and furnish the performance bond required by § 141.14, within the time stipulated in the advertisement of timber sale.

[24 FR 7871, Sept. 30, 1959]

§ 141.11 Acceptance and rejection of bids.

(a) Applicants or bidders may be individuals, associations of individuals, or corporations. In ordinary circumstances the high bid received in connection with any advertisement issued under authority of this part shall be accepted. However, the approving officer, having set forth his reasons in writing shall have the right to reject the high bid:

(1) If he considers the high bidder to be unqualified to fulfill the contractual requirement of the advertisement, or

(2) If he has reasonable grounds to consider it in the interest of the Indians to reject the high bid.

(b) If the high bid is rejected, the approving officer may authorize:

(1) Rejection of all bids, or

(2) Acceptance of the offer of another bidder who, at the time of opening of bids, makes formal request that his bid be so considered.

(c) The officer authorized to accept the bid is also authorized in his discretion to waive minor technical defects in advertisements and proposals.

[24 FR 7871, Sept. 30, 1959]

§ 141.12 Contracts required.

Except as provided in § 141.19(c), in sales of timber with an appraised stumpage value exceeding $2,500 the contract forms approved by the Secretary must be used unless a special form for a particular sale or class of sales is approved by the Secretary. The approved forms provide flexibility to meet variable conditions, but essential departures from the fundamental requirements of such contracts shall be made only with the approval of the Secretary. Unless otherwise directed, the contracts shall require that the proceeds be paid by remittance drawn to the Bureau of Indian Affairs and transmitted to the Superintendent. Contracts may be extended, modified, or assigned subject to approval of the approving officer, and may be terminated by the approving officer upon completion.

[38 FR 24639, Sept. 10, 1973]

§ 141.13 Execution and approval of contracts.

(a) *Contracts for the sale of tribal timber.* All contracts for the sale of tribal timber shall be executed by the authorized representative of the tribe or tribal corporation. Contracts to be valid must be approved by the Secretary. There shall be included with the contract an affidavit executed by the appropriate officer of the tribe or tribal corporation setting forth the resolution or other authority of the governing body of the tribe or tribal corporation authorizing the sale.

(b) *Contracts for the sale of allotted timber.* Contracts for the sale of allotted timber shall be executed by the Indian owners or the Secretary acting pursuant to a power of attorney from the Indian owner, subject to conditions set forth in § 141.13(b) (1), (2), and (3). Contracts to be valid must be approved by the Secretary.

(1) The Secretary shall execute contracts on behalf of minors and Indian owners who are incompetent by reason of mental incapacity after consultation with any legally appointed guardian.

(2) The Secretary shall execute contracts for those persons whose ownership in a decedent's estate has not been determined or for those persons who cannot be located after a reasonable and diligent search and the giving of notice by publication.

(3) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary shall include such unrestricted interest in a sale of the trust or restricted interests in the timber, pursuant to Part 141, and perform any functions required of him by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deductions as service fees from such payments of sums in lieu of administrative expenses.

[29 FR 14741, Oct. 29, 1964]

§ 141.14 Bonds required.

Performance bonds will be required in connection with all sales of Indian timber, except they may or may not be required, as determined by the approving officer, in connection with the use of timber by tribal enterprises pursuant to § 141.6, or in timber cutting permits issued pursuant to § 141.19. In sales in which the estimated stumpage value, calculated at the appraised stumpage rates, does not exceed $10,000 the bond shall be approximately 20 percent of the estimated stumpage value. In sales in which the estimated stumpage value exceeds $10,000 but is not over $100,000, the bond shall be approximately 15 percent of the estimated stumpage value but not less than $2,000; in sales in which the estimated stumpage value exceeds $100,000 but is not over $250,000, the bond shall be approximately 10 percent of the estimated stumpage value but not less than $15,000; and in sales in which the estimated stumpage value exceeds $250,000, the bond shall be approximately 5 percent of the estimated stumpage value but not less than $25,000. Bonds may be in the form of a corporate surety bond by an acceptable surety company; or cash bond designating the approving officer to act under a power of attorney; or negotiable United States Government bonds supported by appropriate power of attorney and performance bond.

[27 FR 12929, Dec. 29, 1962]

§ 141.15 Payments for timber.

The basis of volume determination for timber sold shall be the Scribner Decimal C, International ¼ inch, or International Decimal ¼ inch log rules, cubic volume, weight, or such other form of measurement as the Secretary shall designate for each sale. Payment for timber will be required in advance of cutting pursuant to § 141.16, except for Indian enterprises pursuant to § 141.6. Each advance deposit shall be at least 10 percent of the value of the minimum volume of timber required to be cut annually, figured at the appraised stumpage rates: *Provided*, That the approving officer may reduce the size of the last advance deposit before the completion of the sale or before periods of approximately 3 months or longer during which no timber cutting is anticipated. If a contract stipulates no minimum annual cutting requirements the amount of each advance deposit shall be determined by the approving officer. The advance payments that may be required in the sale of trust allotted timber, pursuant to § 141.16, shall not operate to reduce the size of advance deposits required by this section, but may postpone the necessity of requiring such deposits until the advance payments on the particular allotments being cut have been exhausted.

[27 FR 12929, Dec. 29, 1962]

§ 141.16 Advance payment for allotment timber.

Unless otherwise authorized by the Secretary, and except in the case of lump sum sales, contracts for the sale of timber from trust allotments shall provide for the payment of 25 percent of the stumpage value, calculated at the bid price, within 30 days from the date of approval and before cutting begins. Additional advance payments may be specified in contracts that are more than 3 years in duration; however, no advance payment will be required that would make the sum of such payment and of advance deposits and advance payments previously applied against timber cut from the allotment exceed 50 percent of the bid stumpage value. The advance payments shall be credited against the allotment timber as it is cut and scaled, at the stumpage rates governing at the time of scaling.

[38 FR 246: 9, Sept. 10, 1973]

§ 141.17 Time for cutting timber.

Unless otherwise authorized by the Secretary, the maximum period which shall be allowed, after the effective date of a timber contract, for cutting of the estimated volume of timber purchased shall be 5 years.

[24 FR 7872, Sept. 30, 1959]

§ 141.18 Deductions for administrative expenses.

In sales of timber from either allotted or unallotted lands, a reasonable deduction shall be made from the gross proceeds to cover in whole or in part the cost of managing and protecting the forest lands, including the cost of timber sale administration, but not including the costs that are paid from funds appropriated specifically for fire suppression or forest pest control. Unless special instructions have been given by the Secretary as to the amount of the deduction, or the manner in which it is to be made, there shall be deducted 10 percent of the gross amount received for timber sold under regular supervision, and 5 percent when the timber is sold in such a manner that little administrative expense by the Indian Bureau is required. Service fees in lieu of administrative deductions shall be determined in a similar manner.

(Act of April 30, 1964, 78 Stat. 186, 187)

[29 FR 14741, Oct. 29, 1964]

§ 141.19 Timber cutting permits.

(a) Except as provided in § 141.20, all timber cutting that is not done under formal contract, pursuant to § 141.12, shall be done under timber cutting permit forms approved by the Secretary. Permits will be issued only with

the consent of the Indian owner or the Secretary, for allotted lands, as authorized in § 141.13(b). Such consents to the issuance of cutting permits shall stipulate the minimum stumpage rates at which timber may be sold under permit.

(b) Free-use cutting permits may be issued for specified species and types of forest products by persons authorized under § 141.13 to execute timber contracts. Timber cut under this authority may be limited as to sale or exchange for other goods or services.

(c) An Indian having sole beneficial interest in an allotment may be issued an approved form of special permit to cut and sell designated timber from such allotment. The special permit shall include provision for payment by the Indian of administrative expenses pursuant to § 141.18. Unless waived by the Secretary, the permit shall also require the Indian to make a deposit with the Secretary to be returned to the Indian upon satisfactory completion of the permit or to be used by the Secretary in his discretion for planting or other work to offset damage to the land or the timber caused by the Indian's failure to comply with the provisions of the permit. As a condition to granting a special permit under authority of this paragraph, the Indian may be required to provide evidence acceptable to the Secretary that he has arranged a bona fide sale of the timber to be cut, on terms that will protect the Indian's interests. In special cases, the Secretary may authorize exceptions to the requirement of sole beneficial interest in an allotment.

(d) Permits to be valid must be approved by the Secretary. The stumpage value which may be cut in 1 calendar year by any individual under authority of paragraphs (a) and (b) of this section shall not exceed $2,500, but this limitation shall not apply to cutting under authority in paragraph (c) of this section. Essential departures from the fundamental requirements for issuance of special allotment timber cutting permits under authority of paragraph (c) of this section shall be made only with the approval of the Secretary.

[38 FR 24639, Sept. 10, 1973]

§ 141.20 Free-use cutting without permits.

(a) Timber may be cut by an Indian for his personal use from an allotment in which he holds the sole beneficial interest, without a permit or contract; but timber cut under this authority shall not be sold, or exchanged for other goods or services. Such cutting shall conform to the principles of conservative use as contemplated by § 141.4.

(b) With the consent of the authorized tribal representatives and the Secretary, Indians may cut designated types of forest products from unallotted lands without a permit or contract, and without charge. Timber cut under this authority shall be for the Indian's personal use, and shall not be sold or exchanged for other goods or services. Such cutting shall conform to the principles of conservative use as contemplated by § 141.4.

[24 FR 7872, Sept. 30, 1959]

§ 141.21 Fire protective measures.

The Secretary is authorized to hire temporary labor, rent fire fighting equipment, purchase tools and supplies, and pay for their transportation to extinguish forest or range fires. No expense for fighting a fire outside a reservation may be incurred unless the fire threatens the reservation, or unless such expense is incurred pursuant to an approved cooperative agreement with another forest protection agency. The rates of pay for fire fighters and for equipment rental shall be the rates for such fire fighting services that are currently in use by public and private forest fire protection agencies adjacent to Indian reservations on which a fire occurs, unless there are in effect at the time different rates that have been approved by the Secretary. The Secretary may enter into reciprocal agreements with any fire organizations, maintaining fire protection facilities in the vicinity of Indian reservations, for mutual aid in fire protection. This section does not apply to the rendering of emergency aid, or agreements for mutual aid, in fire protection pursuant to the act of May 27, 1959 (69 Stat. 66).

[24 FR 7872, Sept. 30, 1959]

§ 141.22 Trespass.

(a) Federal statutes provide that:

(1) Willful and unauthorized setting fire to timber, underbrush, or grass or other inflammable material upon any Indian reservation or lands belonging to or occupied by any tribe or group of Indians under authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, is punishable by fine of not more than $5,000 or imprisonment of not more than 5 years, or both.

(2) Whoever, having kindled or caused to be kindled, a fire in or near any forest timber, or other inflammable material on such lands, leaves said fire without totally extinguishing it, or permits such fire to spread beyond his control or leaves such fire unattended shall be fined not more than $500 or imprisoned not more than 6 months, or both.

(3) The unlawful cutting or wanton injury or destruction of trees standing, growing, or being upon such lands is punishable by fine of not more than $1,000 or imprisonment of not more than one year, or both.

(4) Section 1 of the act of June 25, 1948 (62 Stat. 787 (18 U.S.C. 1853)) provides penalties for the unlawful cutting of timber on Government lands and on Indian lands under Government supervision.

(b) The Secretary may mark and forbid the removal of timber from restricted or trust Indian lands or direct its removal to a point of safekeeping when he has reason to believe that such timber was unlawfully cut. Any such timber that can be positively identified as Indian trust property should be sold to prevent its deterioration. When any timber cut in trespass is found to be removed to land not under Government supervision, the owner of the land should be notified that such timber is Indian trust property and any further action should be upon advice of the Office of the Solicitor of the Department of the Interior. Any timber sold under this § 141.22 may be disposed of under the provisions of this Part 141 insofar as they are applicable. The Secretary may accept payment of damages in full in the settlement of civil trespass cases without resort to court action. The Secretary may also accept a recommended settlement per Solicitor's Regulations Manual I.4.1 when exercised in accordance with regulations contained in 344 DM 3.

All other matters relating to the collection of debts under this section will be in accordance with Departmental Manual, Part 344.

(25 U.S.C. 9)

[42 FR 40194, Aug. 9, 1977]

§ 141.23 Appeals under timber contracts.

Any action taken by an approving officer exercising delegated authority from the Secretary of the Interior or by a subordinate official of the Department of the Interior exercising an authority by the terms of the contract may be appealed to the Secretary of the Interior. Such appeal shall not stay any action under the contract unless otherwise directed by the Secretary of the Interior. Appeals will be filed in accordance with any applicable general regulations covering appeals. The Secretary shall notify the appropriate Indian tribal representatives upon receipt of an appeal by the purchaser, and shall notify the purchaser upon receipt of an appeal by the seller.

[24 FR 7872, Sept. 30, 1959]

PART 142—SALE OF LUMBER AND OTHER FOREST PRODUCTS PRODUCED BY INDIAN ENTERPRISES FROM THE FORESTS ON INDIAN RESERVATIONS

Sec.

Sec.
142.10 Payments, discounts, and credit sales.
142.11 Commission sales agents.
142.12 Deposits.

AUTHORITY: 54 Stat. 504, as amended; 5 U.S.C. 301, 41 U.S.C. 6b.

SOURCE: 27 FR 12929, Dec. 29, 1962, unless otherwise noted.

§ 142.1 Definitions.

As used in this part:

(a) "Secretary" means Secretary of the Interior or his authorized representative.

(b) "Forest products" means lumber, lath, shingles, crating, ties, bolts, logs, bark, pulpwood, or other marketable materials obtained from forests and authorized for removal by the Indian enterprises.

§ 142.2 Purpose of regulations.

The regulations in this Part 142 prescribe the terms and conditions under which forest products produced by Indian tribal enterprises from the forests of Indian reservations may be sold without compliance with section 3709 of the Revised Statutes.

§ 142.3 Applicability of regulations.

The regulations in this Part 142 are intended to be generally applicable except that they shall not apply to the Red Lake Reservation in Minnesota; or, as may be determined by the Secretary, to Indian enterprises that have entered into approved agreements for the use of tribal or allotted timber pursuant to § 141.6 of this chapter.

§ 142.4 Sale in open market.

The forest products obtained from the forests on Indian reservations by Indian enterprises may be sold in the open market at such prices as may be realized through the methods provided in this Part 142.

§ 142.5 Advertisement in trade journals and newspapers.

Forest products obtained from Indian reservation forests by Indian enterprises, may be advertised for sale in lumber trade journals of general circulation among persons, companies, or corporations interested in the buying and selling of forest products, and in newspapers in cities that may afford a favorable market for such forest products.

§ 142.6 Advertising, general.

Advertisement of forest products may also be made by circular letters and through personal interviews with the trade: *Provided*, That the travel expense incident thereto shall not be incurred without specific authority from the Secretary.

§ 142.7 Proposals for purchase.

Proposals for the purchase of forest products may be made to the Secretary, and he is authorized to quote prices and consummate sales at such times and/or such terms as are consistent with the regulations of this Part 142.

§ 142.8 Proposals to Government departments.

Proposals to sell may be made to municipalities, counties, states, or the United States and prices may be quoted to such agencies. Terms and payment in connection with such sales may be formulated in accordance with the general practice of such agencies.

§ 142.9 Cash sales.

All forest products of Indian forest enterprises shall be sold for cash f.o.b. mill or other point of delivery, except as provided in §§ 142.8 and 142.10. Adjustments and allowances on shipments of forest products after delivery to the buyer are authorized in accordance with generally accepted trade practices when such adjustments are essential by reason of off-grade shipments or errors in volume.

§ 142.10 Payments, discounts, and credit sales.

Shipments of forest products on open account shall be made only to persons or companies who have an acceptable credit rating. Credit on shipments of forest products sold on open account must not be extended beyond 60 days from date of receipt by the buyer. A cash discount in accordance with general trade practice and usually not exceeding two percent of mill value, may be allowed when the shipment is paid for within ten days of receipt by the consignee as evidenced by the original paid freight bill or other acceptable evidence.

§ 142.11 Commission sales agents.

Sales may be made through commission sales agents, for which they may be paid a commission on f.o.b. mill value of the shipment at approved rates. Sales may be made to wholesalers on which a discount at approved rates may be allowed.

§ 142.12 Deposits.

On all agreements to purchase for future delivery a deposit may be required. Such a deposit may be forfeited if the purchaser does not comply with the terms of sale. No agreement for sale and future delivery shall be made for a longer period than 90 days, except with the approval of the Secretary.

10. Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona (Excerpts)

. . .

PREAMBLE

We, the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona, in order to form a more representative organization, to exercise the duties and responsibilities of a representative tribal government, to conserve and develop our tribal lands and resources for ourselves and our children, to provide a higher standard of living, better home life and better homes within the reservation, to extend to our people the right to form business and other organizations, do adopt this Constitution and Bylaws as

a guide to our self-governing program.

ARTICLE I - STATEMENT OF PURPOSE

Section 1. In our relation to the United States Government, a relation similar to that which a town or a county has to a State and Federal Government, our own internal affairs shall be managed, insofar as such management does not conflict with the laws of the United States, by a governing body which shall be known as the White Mountain Apache Tribal Council.

ARTICLE II - TERRITORY

The authority of the White Mountain Apache Tribe, of Arizona, shall extend to all of the territory within the exterior boundaries of the Fort Apache Indian Reservation as established by the Act of Congress, June 7, 1897, and to such other lands as the United States may acquire for the benefit of the tribe, or which the tribe may acquire for itself.

. . .

ARTICLE V - POWERS OF THE COUNCIL

Section 1. In addition to all powers vested in the White Mountain Apache Tribal Council by existing law, the White Mountain Apache Tribal Council shall exercise the following powers, subject to any limitations imposed by the Constitution or the Statutes of the United States applicable to Indians or Indian tribes, and subject further to all expressed restrictions upon such powers contained in this constitution and bylaws:

(a) To represent the tribe and act in all matters that concern the welfare of the tribe, and to make decisions not inconsistent with or contrary to this Constitution and Bylaws of the

Constitution and Statutes of the United States applicable to Indians or Indian tribes.

(b) To negotiate, make and perform contracts and agreements of every description, not inconsistent with law or this Constitution and subject to the review and approval of the Secretary of the Interior where such review or approval is required by statute or regulation, with any person, association, or corporation, with any municipality or any county, or with the State of Arizona or the United States, including agreements with the State of Arizona for rendition of public services.

. . .

(e) To veto the sale, disposition, lease or encumbrance of tribal lands, interests in lands, tribal funds or other tribal assets that may be authorized by any agency or employee of the Government.

(f) To protect and preserve the wildlife, natural resources and water rights of the tribe, to regulate hunting and fishing on the reservation.

(g) To cultivate Indian arts, crafts, and cultures.

(h) To regulate the uses and disposition of tribal property.

(i) To manage all economic affairs and enterprises of the tribe including tribal lands, timber, sawmills, flour mills, community stores, and any other tribal activities.

(j) To accept grants or donations from any person, State or the United States.

(k) To appropriate tribal funds for tribal purposes and to expend such funds

in accordance with an annual budget approved by the Secretary of the Interior.

(l) To borrow money from any source and pledge or assign chattels or future tribal income as security therefor, subject to the review and approval of the Secretary of the Interior.

(m) To provide by ordinance for the assignment, use or transfer of tribal lands within the reservation.

(n) To enact ordinances subject to review and approval by the Secretary of the Interior covering the granting of both surface and subsurface leases for such periods as are permitted by law.

(o) To levy and collect taxes and to impose license fees, subject to review and approval by the Secretary of the Interior, upon members and non-members doing business within the reservation.

. . .

(q) To enact ordinances, subject to review and approval by the Secretary of the Interior, establishing and governing tribal courts and law enforcement among Indians on the reservation, regulating domestic relations of members of the tribe, but all marriages and divorces shall be in accordance with State laws, providing for appointment of guardians for minors and mental incompetents, regulating the inheritance of non-restricted real and personal property of members of the tribe within the reservation, and providing for the removal or exclusion from the reservation of any non-member of the tribe whose presence may be injurious to the people of the reservation.

(r) To enact ordinances governing the activities of voluntary associations

consisting of members of the tribe organized for purposes of cooperation or other purposes.

(s) To regulate its own procedures, to appoint subordinate committees, commissions, boards, advisory or otherwise, tribal officials and employees not otherwise provided for in this Constitution and Bylaws and to regulate subordinate organizations for economic and other purposes.

(t) The Tribal Council of the White Mountain Apache Tribe may exercise such further powers as may be delegated to the Council by members of the tribe or by the Secretary of the Interior, or any other duly authorized official or agency of the State or Federal Government.

(u) The foregoing enumeration of powers shall not be construed to limit the powers of the White Mountain Apache Tribe.

11. Ariz. Rev. Stat. § 28-1551 (1976)

In this article, unless the context otherwise requires:

. . .

4. "Highway" means any way or place in this state of whatever nature, open to the use of the public, for purposes of traffic, including highways under construction.

5. "In this state" means within the exterior limits of the state of Arizona and includes all territory within these limits owned by or ceded to the United States of America.

10. "Use" includes the placing of fuel into any receptacle on a motor

vehicle from which fuel is supplied for the propulsion of the vehicle unless the operator of the vehicle establishes to the satisfaction of the motor vehicle superintendent that the fuel was consumed for a purpose other than to propel a motor vehicle on the highways of this state, and, with respect to fuel brought into this state in any such receptacle, the consumption of the fuel in this state. A person placing fuel in a receptacle on a motor vehicle of another who holds a valid use fuel tax license is not deemed to have used the fuel.

11. "Use fuel" includes all gases and liquids used or suitable for use to propel motor vehicles, except such fuels as are subject to the tax imposed by article 1 of this chapter.

12. "User" includes any person who, within the meaning of the term "use" as defined in this article, uses fuel.

12. Ariz. Rev. Stat. § 28-1552 (1976)

Imposition of tax

For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of eight cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within this state, such tax to be collected and remitted to this state or paid to this state as follows:

1. By a vendor, measured by the volume of use fuel:

(a) Delivered by him into the fuel tank of a motor vehicle not operated by him, or

(b) Used by him on the highways of this state in the propulsion of a motor vehicle operated by him.

2. By a user, measured by the volume of use fuel imported into this state or acquired without payment of tax to a vendor within this state, and used in the propulsion of a motor vehicle on the highways of this state.

3. The tax, with respect to fuel acquired by any fuel user in any manner other than delivery by a vendor into a fuel tank of a motor vehicle, shall attach at the time of the consumption of such fuel in the propulsion of a motor vehicle upon the highways of this state, and shall be paid over to the superintendent by the fuel user with the report required and in accord with other applicable provisions of this article.

13. Ariz. Rev. Stat. § 28-1556 (1976)

Presumption of Use

A. For the proper administration of this article, and to prevent evasion of the excise tax, it shall be presumed, until the contrary is established by competent proof under rules and procedures the superintendent adopts, that all use fuel received into any receptacle on a motor vehicle from which fuel is supplied to propel such vehicle, is consumed in propelling the vehicle on the highways of this state.

14. Ariz. Rev. Stat. § 40-601 (1974)

A. In articles 1 and 2 of this chapter, unless the context otherwise requires:

7. "Contract motor carrier of property" means any person engaged in the transportation by motor vehicle of property, for compensation, on any public highway, and not included in the term common motor carrier of property, and, for the purpose of taxation, the owner of any motor vehicle in excess of six thousand pounds unladen weight who leases, licenses or by any other arrangement permits the use of such vehicle by any other, other than a common or contract carrier subject to tax under articles 1 and 2 of this chapter, for the transportation of property upon the public highway for compensation or in the furtherance of any commercial or industrial enterprise.

8. "Motor carrier" means any common motor carrier of property or passengers, or any contract motor carrier of property or passengers.

9. "Motor vehicle" means any automobile, truck, truck tractor, trailer, semi-trailer, motor bus or any self-propelled or motor driven vehicle used upon any public highway of this state for the purpose of transporting persons or property, except farm tractors, implements of husbandry and other vehicles designed primarily for or used in agricultural operations and only incidentally operated or moved upon a highway, which shall be exempt from the provisions of this chapter.

11. "Public highway" means any public street, alley, road, highway or

thoroughfare of any kind used by the public, or open to the use of the public as a matter or right for the purpose of vehicular travel.

15. Ariz. Rev. Stat. § 40-641 (1974)

License tax upon motor carriers; collection; disposition

A. In addition to all other taxes and fees:

1. Every common motor carrier of property and every contract motor carrier of property shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-half per cent of the gross receipts from the carrier's operations within the state for the preceding calendar month, excluding receipts from property transported under a star route contract with the federal government. The gross receipts from the operation for hire by a common motor carrier of property or a contract motor carrier of property of a farm tractor or implements of husbandry exempt from registration, whether incidental to the operations as such motor carrier or otherwise, shall not be subject to the tax imposed by, or other provisions of, this article.

2. Every common motor carrier of passengers and every contract motor carrier of passengers shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-quarter per cent of the gross receipts from his operations within the state for the preceding calendar month.

B. When any carrier operates partly within and partly without the state, the

gross receipts of the carrier within the state shall be deemed to be all receipts of business beginning and ending within the state, and a proportion based upon the proportion of the mileage within the state to the entire mileage over which business is done, of receipts on all business passing through, into or out of the state.

C. Upon receipt of the taxes the department of transportation shall forthwith transmit them to the state treasurer, who shall credit them to the Arizona highway user revenue fund.